TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ, ET AL., PETITIONERS,

vs.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 10, 1963
CERTIORARI GRANTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ, ET AL., PETITIONERS,

vs.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 26, 1963

[fol. A] [File endorsement omitted]

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Joint Appendix—Filed November 17, 1962

[fol. 2] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Number—3729-'61

PARTIES—VICTOR RABINOWITZ, LEONARD B. BOUDIN

v.

THE ATTORNEY GENERAL OF THE UNITED STATES,
Department of Justice

Attorneys—David Rein, Joseph Forer, 711 14th St., N.W.; David C. Acheson (U.S. Court House), George B. Searls, Nathan L. Lenvin, Irene A. Bowman, Kathleen M. Malone, Dept. of Justice

Action for—Declaratory Judgment

DOCKET ENTRIES

Date	*Account*
1961	
Nov. 15	Rein; Rec'd, 10 00
Nov. 15	U.S. Treas.—Disb'd 10 00

Date	*Proceedings*
1961	Deposit for cost by
Nov. 15	Complaint, appearance, Exhibits A & B. filed
Nov. 15	Summons, copies (2) and copies (2) of Complaint issued U.S. Atty ser. 11-15-61. Atty Gen. ser. 11-17-61.
[fol. 3]	
1962	
Jan. 11	Answer of deft to complaint; c/m 1-11-62; Appearance of David C. Acheson; Nathan B. Lenvin, Irene A. Bowman, and Kathleen M. Malone. filed
Jan. 11	Calendared (N)
Jan. 17	Motion of deft for judgment on the pleadings; c/m 1-17-62; P & A; M.C. 1-17-62. filed
Jan. 24	Stipulation of counsel for pltf and deft extending time for pltfs to file opposition to defts motion for judgment on pleadings to and including 2-16-62. filed
Feb. 16	Opposition of pltf to deft's motion for judgment on pleadings; c/m 2-16-62. filed
Mar. 20	Motion of deft for Judgment on the Pleadings argued & submitted. Curran, J.
Apr. 4	Order denying motion of deft for judgment on the pleadings. (N) Curran, J.
Apr. 13	Motion of defendant to amend order; consent filed

1962

Apr. 13 Order denying motion for judgment on the pleadings; immediately appeal from this order may materially advance the ultimate termination of the litigation. (N) Curran, J.

May 15 Appearance of George B. Searls as atty for deft. (AC/N) filed

May 15 Notice of appeal by deft; copy mailed to David Rein. filed

May 16 Certified copy of order of USCA granting permission to appeal from USDC order of 4/13/62. filed.

[fol. 4] IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

[Title omitted]

COMPLAINT FOR DECLARATORY JUDGMENT

Filed November 15, 1961

The plaintiffs, Victor Rabinowitz and Leonard B. Boudin, complaining of the defendant, the Attorney General of the United States, allege:

1. The Court has jurisdiction of this action under D.C. Code, sections 11-305 and 11-306, and 28 U.S. Code, section 2201.

2. The plaintiffs are members of the bar of the State of New York and of various federal courts, including the Supreme Court of the United States. They are engaged in the general practice of law under the firm name of Rabinowitz and Boudin, with their principal office in New York City.

3. The defendant is by law charged with the administration of the Foreign Agents Registration Act of 1938, as amended, 22 U.S. Code, sections 611 ff.

4. On or about September 10, 1960, the law firm of Rabinowitz and Boudin was retained by the Government of the Republic of Cuba to represent in the United States the

Republic of Cuba and its governmental agencies in legal [fol. 5] matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba. The retainer includes the authority to retain counsel in States where the firm is not licensed to practice. The retainer does not cover advice or representation involving public relations, propaganda, lobbying or political or other non-legal matters, nor have the plaintiffs advised, represented, or acted on behalf of the Republic of Cuba in any such matters.

5. On or about August 31, 1961, the defendant, acting through his subordinates, demanded that the plaintiffs, individually and as a law firm, register with the Attorney General under the provisions of the Foreign Agents Registration Act of 1938, as amended.

6. Thereafter the plaintiffs discussed the demand for their registration with the subordinates of the defendant, maintaining that their representation of the Republic of Cuba does not fall within the purview of the Act. The defendant nevertheless continues to insist on his registration demand. Therefore, unless plaintiffs register in accordance with the provisions of the Act and the rules and regulations thereunder, they face indictment and prosecution for violation of the Act.

7. In accordance with the authority conferred upon the defendant by the Act, the defendant has published and prescribed Forms FA-2 and FA-4 as the registration forms required to be filed under that Act. If the plaintiffs should execute these forms they would thereby make public disclosure not only of their relation with their foreign principal, but of numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba. In addition, similar public disclosures of private, personal and business affairs having no connection with their representation of the Republic of Cuba would be required from employees of the plaintiffs and counsel who may be retained by plaintiffs in connection [fol. 6] with litigation in the courts throughout the country. Forms FA-2 and FA-4 are attached hereto and made a part hereof as Exhibits A and B respectively.

8. The plaintiffs have freely furnished to all government authorities authorized to request such information the particular details concerning their representation of the Republic of Cuba.

9. The activities of the plaintiffs as legal representatives of the Republic of Cuba do not fall within the purview of the Foreign Agents Registration Act of 1938, as amended, and also are specifically exempted from the requirements of registration under the Act by section 3(d) of the Act.

10. Registration under the Act will result in a serious invasion of the privacy of the plaintiffs. Moreover, this invasion of privacy will seriously interfere with the practice of law by the plaintiffs, since other lawyers whom they will wish to employ or retain may refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy.

11. Plaintiffs in good faith believe that their activities do not come within the scope of the Act and that they are not required to register under the Act. Accordingly, they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register. Indictment and prosecution, even without more, will seriously damage plaintiffs' reputation and interfere with their practice of law and their ability to employ and retain associate counsel.

12. Plaintiffs have no administrative remedy and no adequate remedy at law.

[fol. 7] Wherefore, plaintiffs demand judgment declaring that their activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended, and granting such other and further relief as may be appropriate.

David Rein, Joseph Forer, Forer & Rein, 711 14th St., N.W., Washington, D. C., Attorneys for Plaintiffs.

[fol. 8]

EXHIBIT A TO COMPLAINT

(See opposite) ☞

Form approved: B.O. [illegible]
Budget Bureau No. 43-R011.3

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Form FA-2

FOR REGISTRATION STATEMENTS OF PARTNERSHIPS, CORPORATIONS, ASSOCIATIONS, AND ALL OTHER ORGANIZATIONS AND GROUPS

Pursuant to Section 2 of the Foreign Agents Registration Act of 1938, as amended

INSTRUCTION SHEET—READ CAREFULLY

1. *Form for Registration of Organizations.*—All partnerships, corporations, associations, and other organizations and groups required to register under Section 2 of the Act shall use this form for their registration statements.

2. *Read Act and Rules.*—The Act and the Rules thereunder should be carefully read before filling in this form. Copies of the Act and Rules may be obtained from the Department of Justice without charge.

3. *File Two Copies of Statement.*—Two copies of the statement, including exhibits, are to be filed. An additional copy of the statement and exhibits should be prepared and retained by Registrant for future reference.

4. *File Statement With Department of Justice.*—The statement is to be filed with the Department of Justice, Washington, D. C.

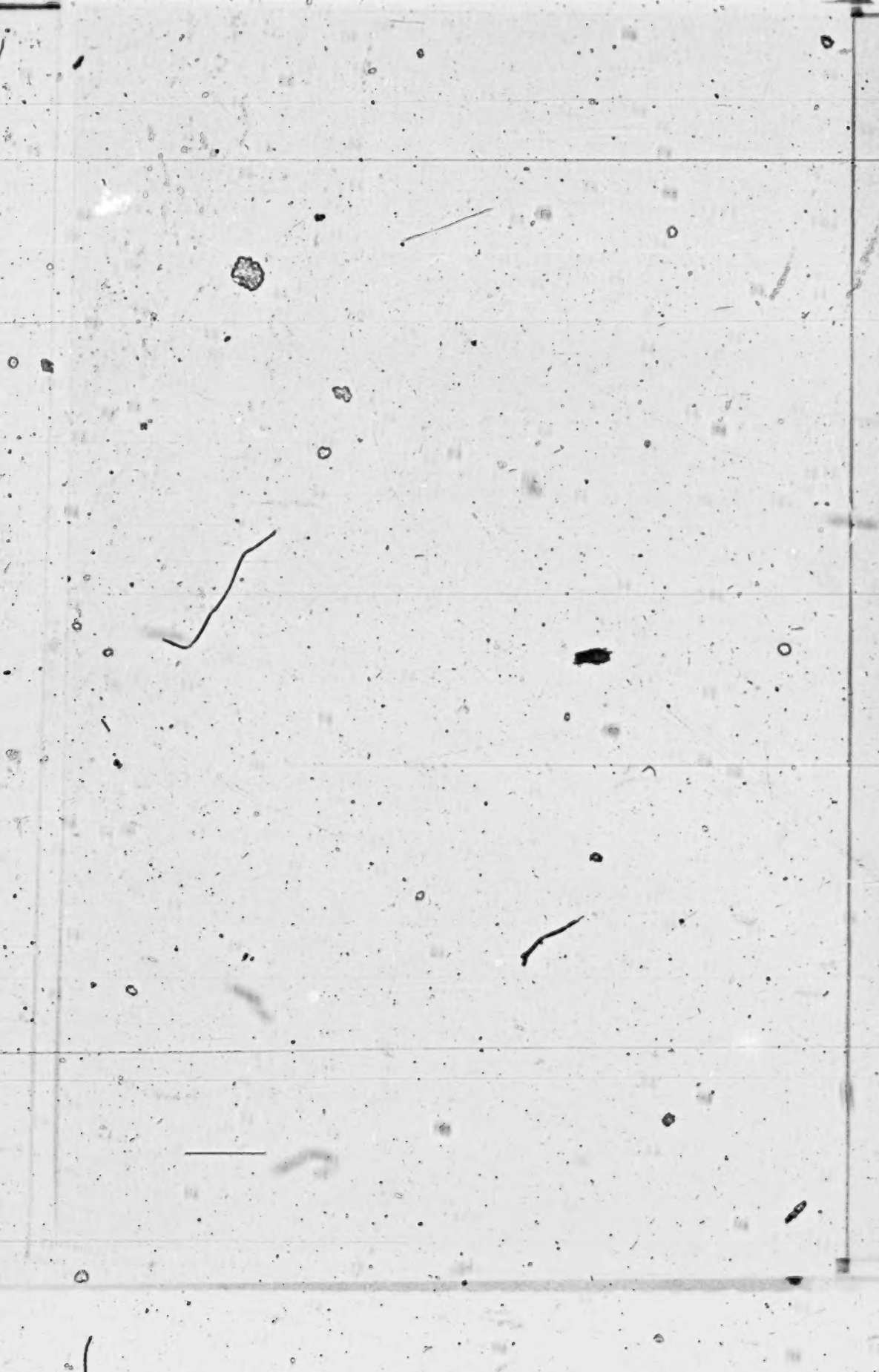
5. *Answer All Items.*—All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable," so state.

6. *Inappropriate or Burdensome Requirements.*—If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement. Applications for such waivers should state fully the reasons why the waiver is desired.

7. *Information Not Obtainable.*—If any of the information called for by any item of this form is not known and cannot readily be ascertained, so indicate and state briefly the reasons why the information cannot be obtained.

THIS STATEMENT WILL NOT BE ACCEPTED FOR FILING UNLESS IT IS REASONABLY COMPLETE AND ACCURATE AND IS SIGNED AND SWORN TO IN ACCORDANCE WITH THE REQUIREMENTS OF THE FORM.

NOTE.—*Omit this instruction sheet when filing statements of*



FORM FA-1

[fol. 9]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

REGISTRATION STATEMENT

Pursuant to Section 2 of the Foreign Agents Registration Act of 1938, as Amended

(a) Name of Registrant.

(b) All other names used by Registrant during the past 10 years and when used.

(c) Address of principal office.

(d) Name of person or persons in charge of principal office.

(a) Date when Registrant was organized or created.

(b) State or other jurisdiction in which organized or created.

(c) Type of Registrant's organization.

Committee ..... Voluntary group ..... Association ..... Partnership .....

Corporation ..... Other type (specify) .....

If Registrant is a nonbusiness membership organization, state:

(a) Approximate number of members in the United States .....

(b) Approximate number of members outside the United States .....

(c) If more than one class of members, specify classes and approximate number of members in each.

(d) Who may be members and on what terms and conditions.

[fol. 10]

All partners, officers, directors, and similar officials of Registrant.

Name and address of official	Position, office, or nature of duties

All branches and local units of Registrant and all other component or affiliated groups or organizations.

Name and address of branch, unit, group, or organization	Nature of connection with Registrant	Name and address of person in charge

Name and principal address of each foreign principal of Registrant.

Name of foreign principal	Principal address

State the nature and purpose of Registrant's representation of each foreign principal named under item 6 and describe fully all activities of Registrant for or in the interests of each such foreign principal.

8. Describe briefly all other businesses, occupations, and public activities in which Registrant is presently engaged.

9. All employees and other individuals, except those named under item 4, who render any services or assistance to Registrant, with or without compensation, for or in the interests of each foreign principal named under item 4.

Name and address of employee or other individual	*Nature of services or assistance rendered*

10. Furnish the following information as to Registrant's receipts and expenditures during the 3 months preceding the filing of this statement. The information may, if Registrant desires, be furnished for Registrant's latest fiscal quarter or other latest fiscal period of not less than 3 months.

(a) All amounts received during the period directly or indirectly from each foreign principal named under item 4, itemized as follows: [1]

Date funds received	*Name of foreign principal from whom funds received* [2]	*Purposes for which received* [3]	*Amount received* [4]

[1] Include all amounts so received, whether received as compensation, loans, contributions, subscriptions, fees, dues, subsidies, or otherwise.

[2] Receipts from a person amounting to less than $100 for the period may be combined with other like amounts, provided the source of the funds is clearly indicated.

[3] Where funds were received for various purposes, each purpose shall be listed in reasonable detail.

[4] Show separately the amount received for each purpose listed under the preceding column.

[fol. 12]

FORM 6-A

(b) All amounts received during the period from other sources to be used directly or indirectly for or in the interests of any foreign principal named under item 6, itemized as follows: [1]

Date funds received	Name of person from whom received [2]	Purpose for which received [3]	Amount received [4]

(c) All expenditures made during the period directly or indirectly for or in the interest of each foreign principal named under item 6, itemized as follows: [5]

Date payment was made	Name of person to whom payment was made [2]	Purpose for which payment was made [3]	Amount of payment [4]

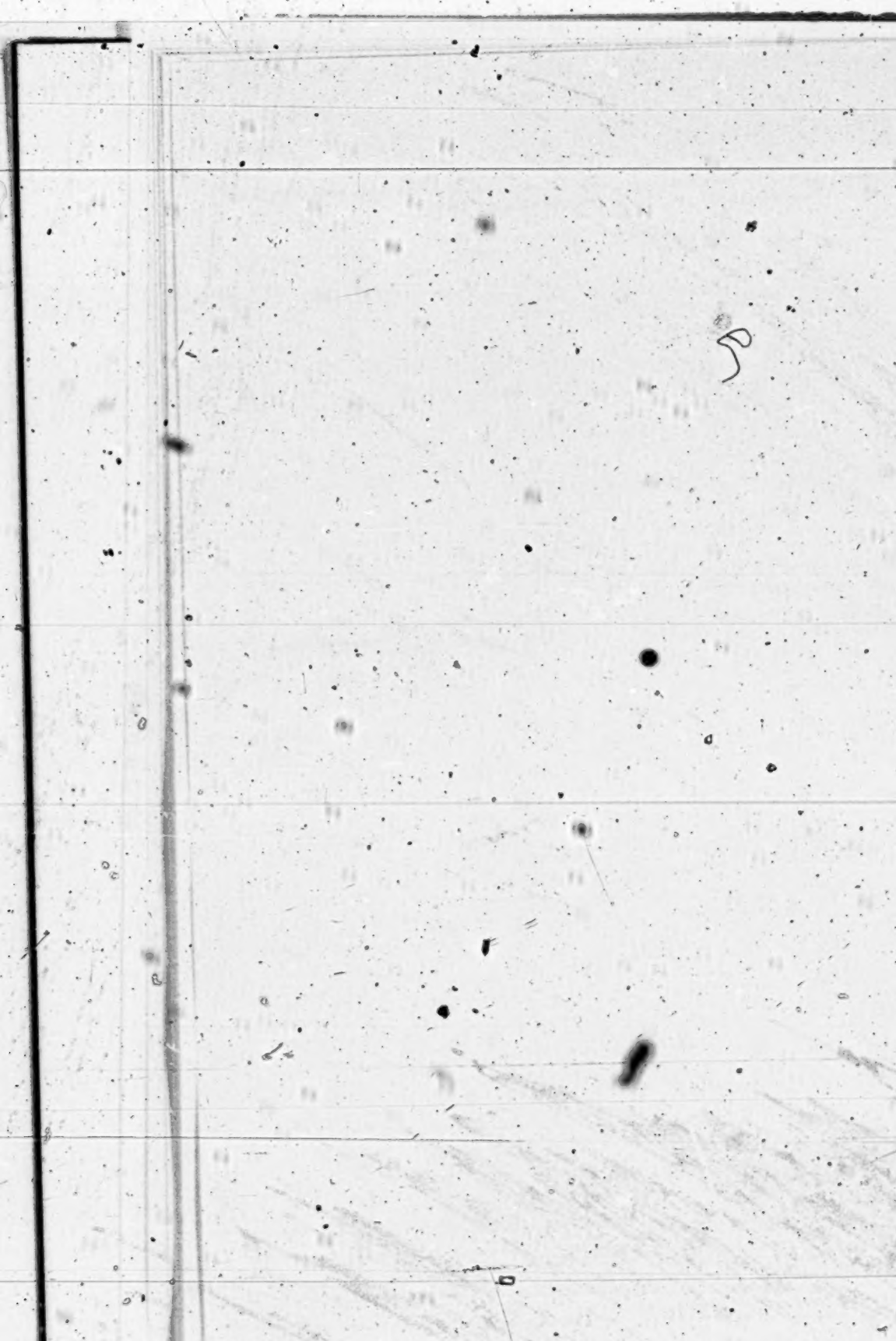
[1] Include all amounts as received, whether received as compensation, loans, contributions, subscriptions, fees, dues, rebates, or otherwise.

[2] Receipts from or expenses to a person amounting to less than $500 for the period may be combined with other like amounts, provided the source or disposition of the funds, as the case may be, is clearly indicated.

[3] Where funds were received or paid, as the case may be, for various purposes, each purpose shall be listed in reasonable detail.

[4] Show separately the amounts received or paid, as the case may be, for each purpose listed under the preceding column.

[5] Include all transfers of funds to any foreign principal.



[fol. 13]

FORM No. 4

11. (a) Speeches, lectures, talks, and radio broadcasts arranged or sponsored by Registrant or delivered by officials or employees of Registrant, during the past 3 months.

Date delivered	By whom delivered	Where delivered[1]	Kind of audience	Subject matter discussed

(b) Publications prepared or distributed by Registrant, or by others for Registrant, or in the preparation or distribution of which Registrant rendered any services or assistance, during the past 6 months. (Indicate each type of publication by an "X".)

(1) Press releases	(8) Circulars	(15) Lantern slides .....
(2) News bulletins	(9) Form letters	(16) Still pictures .....
(3) Newspapers	(10) Reprints	(17) Posters .....
(4) Articles	(11) Copies of speeches, lectures, talks, or radio broadcasts	(18) Photographs .....
(5) Books		(19) Charts .....
(6) Magazines	(12) Radio programs	(20) Maps .....
(7) Pamphlets	(13) Radio scripts	(21) Other publications .....
	(14) Moving pictures	

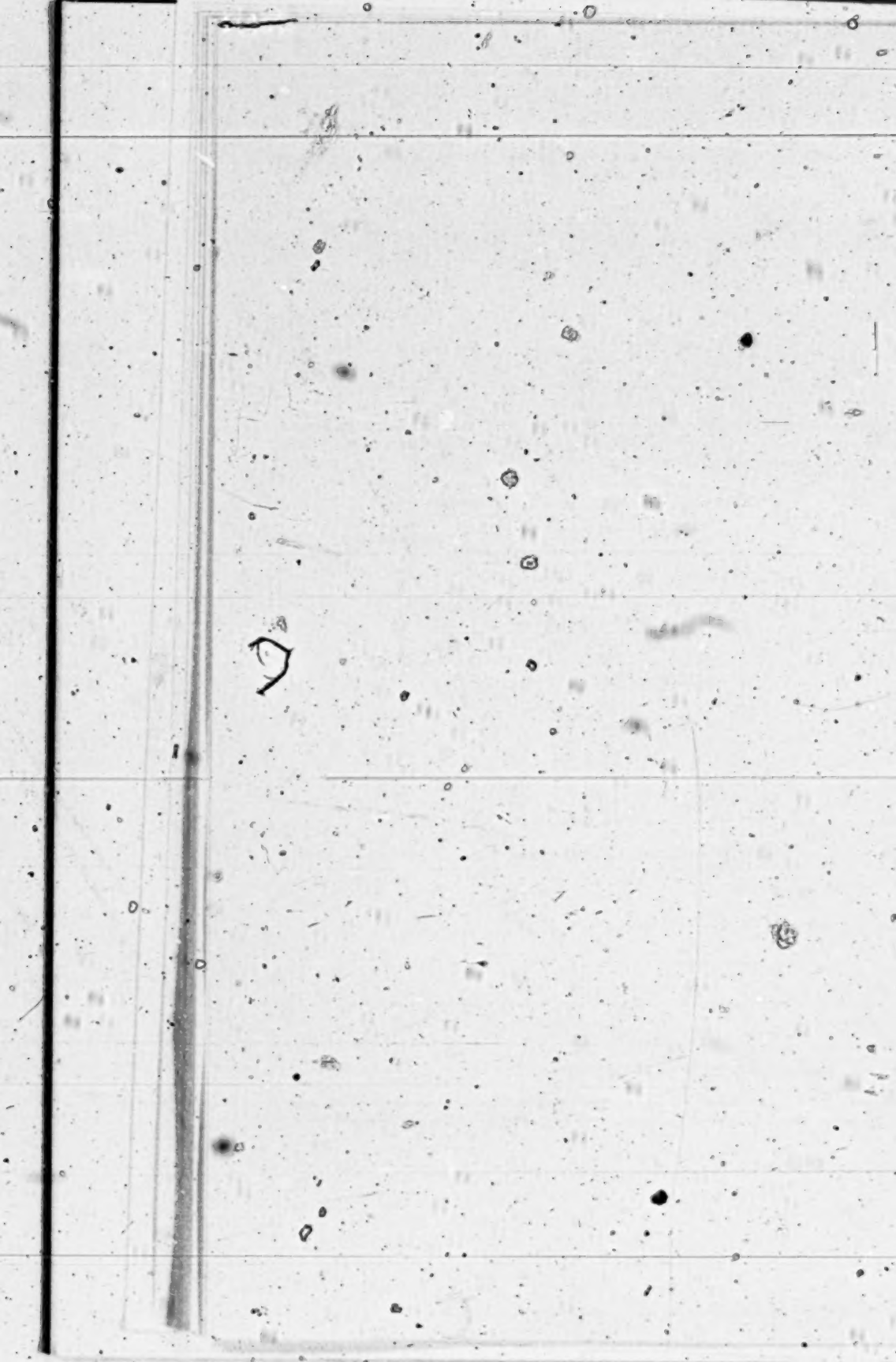
(c) Preparation of publications referred to in answer to (b) above.

Number checked under (b)	Description of publication	By whom written, edited, or prepared	By whom printed, produced, or published

(d) Distribution of publications referred to in answer to (b) above.

Number checked under (b)	Name of distributor	Methods and channels of distribution	Classes or groups of persons to which distributed

[1] In case of radio broadcasts, identify the stations from which the broadcasts were made.



6

FORM FA-2

12. (a) Registrant's affiliations, associations, or other connections, not fully described above, with foreign governments, foreign political parties, or officials or agencies thereof.

Name of government, party, or official or agency thereof	Nature of Registrant's connections therewith

(b) Registrant's pecuniary interest in or control over partnerships, corporations, associations, or other organizations or combinations of individuals, not fully described above.

Name of organization or combination	Nature of Registrant's ownership or other pecuniary interest	Nature of any direction or control exercised by Registrant

13. (a) Ownership of, or supervision, direction, or control over, Registrant by all organizations, groups, or individuals.

Name of organization, group, or individual	Nature of ownership, supervision, direction, or control

(b) Any subsidy or other financial assistance received by Registrant directly or indirectly from—

Any individual who is a citizen of, or resides in, a foreign country.

Any organization created in, or under the laws of, any foreign country or having its principal place of business in a foreign country.

Any foreign government or foreign political party, or any official or agency thereof.

Name of person from whom subsidy or financial assistance received	*Nature and amount of subsidy*

14. File the following exhibits with this statement:

Short Form Registration Statement - File a Short Form Registration Statement, on the printed form provided therefor, for each person named under items 4 and 9.

Exhibit B.—File a copy of the agreement, arrangement, or authorization (or if not in writing a written description thereof) pursuant to which Registrant is acting for, or receiving funds from, each foreign principal named under item 6.

Exhibit C.—File an Exhibit C, on the printed form provided therefor, for each foreign principal named under item 6.

Exhibit D.—If Registrant is a nonbusiness organization, file a copy of its charter, constitution, bylaws, or other instruments of organization.

Exhibit E.—File copies of all printed matter referred to under item 11 (*b*), except photographs and moving pictures.

Exhibit F.—File a copy of the agreement or arrangement (or if not in writing, a written description thereof) between the Registrant and each business firm or other organization named under item 11 (*c*) or (*d*).

[fol. 16]

FORM FA-1

The undersigned owner(s) or officer(s) that he has (they have) read the information set forth in this registration statement and the attached exhibits and that he is (they are) familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his (their) knowledge and belief, except that the undersigned make(s) no representation as to the truth or accuracy of the information contained in attached Short Form Registration Statements, insofar as such information is not within his (their) personal knowledge.

(Type or print name under each signature)

_____
(Signature)

_____
(Signature)

_____
(Signature)

_____
(Signature)

(Each copies of this statement shall be signed and sworn to before a notary public or other person authorized to administer oaths. The statement shall be signed by the Agent or, if the Agent is an organization, by a majority of those partners, officers, directors, or persons performing similar functions who are in the United States. If no such person is in the United States, the statement shall be signed and sworn to by the duly authorized representative of the Registrant.)

Subscribed and sworn to before me at _____

this _____ day of _____, 19____

_____
(Signature of notary or other officer)

My commission expires _____, 19____

[fol. 17]

Exhibit B to Complaint

Form No. 7A-4
(Rev. 12-27-50)

Budget Bureau No. 43-R215.6
Approval expires 1-31-53

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

SHORT-FORM REGISTRATION STATEMENT

Under the Foreign Agents Registration Act of 1938, as Amended

This statement is required to be filed by all officers, directors, partners, or associates in conjunction with a registration statement filed in the name of a corporation, partnership, association or other combination of individuals, as the case may be, and by all persons who render services or assistance to the registrant in other than a clerical or secretarial capacity, with or without compensation, for or in the interest of any foreign principal of the registrant.

THIS STATEMENT WILL NOT BE ACCEPTED FOR FILING UNLESS IT IS COMPLETE AND ACCURATE.

1. Name and address of registrant.

2. *(a)* Your full name.

(b) All other names ever used and when each was used.

(c) All present business addresses.

(d) All present residence addresses.

3. *(a)* Date and place of birth.

(b) Citizenship or nationality.

(c) If present citizenship not acquired by birth, indicate when, where, and how acquired.

4. All visits to or residence in foreign countries during the past 5 years.

Name of foreign country	*Purpose of visit or stay in foreign country*	*Date and port of each departure from and entry into United States*

[fol. 18]

(c) All clubs, societies, committees, and other organizations in the United States or elsewhere, including any active or reserve military or naval forces, of which you have been a member, director, officer, or employee during the past 2 years.

Name and address of organization	Nature of connection with organization	Duration of connection

(a) A full description of all activities of any kind in which you are now or expect to be engaged for or in the interests of the Registrant or any foreign principal of yourself or of the Registrant.

(b) A brief description of all other businesses, occupations, and public activities in which you are now engaged.

(a) Describe in detail the financial arrangement pursuant to which you are rendering services or assistance to the registrant for or in the interests of any foreign principal of the registrant.

(b) Furnish the following information as to all amounts or thing of value received by you, as compensation or otherwise, during the 3 months preceding the filing of this statement, directly or indirectly from the registrant or from any foreign principal of yourself or of the registrant.

Date funds received	Name of person from whom received	Purpose for which received	Amount or thing of value received

[fol. 19]

8. (a) Speeches, lectures, talks, and radio and television broadcasts delivered by you during the past 3 months.

Date delivered	Where delivered	Kind of audience	Subject matter discussed

(b) All newspapers, magazines, articles, books, pamphlets, press releases, moving pictures, radio and television programs and scripts, and other publications, prepared or distributed by you or by others for you, or in the preparation or distribution of which you rendered any services or assistance, during the past 6 months.

Description of publication	By whom written, edited, or prepared	By whom printed, produced, or published	By whom distributed

9. List all of your connections, not fully described above, with all foreign governments, foreign political parties or officials or agencies thereof.

Name of government, party or official or agency thereof	Nature of your office, employment, or other connection	Nature of any subsidy or other financial arrangement

I certify that I have read the information set forth in this statement and am familiar with the contents thereof and that the information herein contained is true to the best of my knowledge and belief.

(Signature)

(Date of signature) (Type or print name)

(Two copies of this statement shall be filed. Both copies shall be signed by the person for whom the information contained herein is given. A third copy should be prepared and retained for future reference.)

[fol. 21]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

ANSWER—Filed January 11, 1962

Comes now the defendant by the undersigned attorneys and fully answering the complaint avers as follows:

First Defense

The Court is without jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The nature of the relief sought by the complaint is an advisory opinion which this Court lacks jurisdiction to render.

Fourth Defense

The injury to plaintiffs alleged by the complaint is too remote to give standing to sue.

Fifth Defense

The complaint fails to show a justiciable case or controversy.

Sixth Defense

Answering specifically the numbered paragraphs of the complaint, the defendant further avers:

1. The allegations of Paragraph 1 are denied.

2. The allegations of Paragraph 2 are admitted.

[fol. 22] 3. The allegations of Paragraph 3 are admitted.

4. Answering the allegations of Paragraph 4, the defendant admits the allegations contained in the first sentence but as to the second and third sentences the defendant has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained therein.

5. The allegations of Paragraph 5 are admitted.

6. Answering the allegations of Paragraph 6, the defendant admits the allegations contained in the first and second sentences. Further answering, with respect to the third sentence, under the provisions of the Act any person who wilfully fails to file a registration statement as required by the statute is subject, upon conviction thereof, to criminal penalties as provided therein.

7. Answering the allegations of Paragraph 7, the defendant admits the allegations contained in the first and fourth sentences. With respect to the second sentence the defendant admits that the registration forms provided for under the terms of the Act require the plaintiffs to make public disclosure of their relations with their foreign principal, but the defendant denies that the registration forms require public disclosure of numerous private, personal and business affairs unconnected with the plaintiff's representation of the Republic of Cuba. Further answering, no reply is required of the defendant to the allegations contained in the third sentence since they are conclusions of law, but to the extent an answer may be required, the defendant denies the allegations therein.

8. The defendant is not required to answer the allegations of Paragraph 8 since they are immaterial, but to the extent that an answer be required, with respect to the Department of Justice the defendant avers that plaintiffs have failed to furnish the Department with a properly executed registration statement as requested.

9. The allegations of Paragraph 9 are denied.

[fol. 23] 10. With respect to Paragraph 10, the defendant is not required to answer the allegations contained therein in that they are conclusions of law and immaterial, but to the extent an answer may be required, the defen-

dant has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

11. The defendant is not required to answer the allegations of Paragraph 11 as they contain conclusions of law and are immaterial, but to the extent that answer be required, the defendant has neither knowledge nor information sufficient to form a belief as to the truth of what the plaintiffs believe in good faith. Further answering, the defendant avers that the plaintiffs refuse and have refused to register under the requirements of the Act as requested by the defendant.

12. The allegations of Paragraph 12 are denied except that the defendant admits that the Act does not provide an administrative remedy. The defendant avers, however, that Congress has provided an adequate remedy at law.

David C. Acheson, United States Attorney, Nathan B. Lenvin, Attorney, Department of Justice, Irene A. Bowman, Attorney, Department of Justice, Kathleen M. Malone, Attorney, Department of Justice.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS—Filed January 17, 1962

Comes now the defendant by the undersigned attorneys and moves for judgment on the pleadings for the reason that on the pleadings defendant is entitled to judgment as a matter of law.

David C. Acheson, United States Attorney, Nathan B. Lenvin, Attorney, Department of Justice, Irene A. Bowman, Attorney, Department of Justice, Kathleen M. Malone, Attorney, Department of Justice.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

ORDER—Filed April 4, 1962

This cause came before the Court on defendant's motion for judgment on the pleadings. The Court, having heard counsel for the parties in open court, and having considered the pleadings and the memoranda filed by the parties, it is by the Court this 4th day of April, 1962,

Ordered that defendant's motion for judgment on the pleadings be and the same is hereby denied.

Edward M. Curran, United States District Judge.

Copy mailed this 4th day of April, 1962 to Nathan B. Lenvin, Department of Justice, Washington, D. C., Attorney for Defendant.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

MOTION TO AMEND ORDER—Filed April 13, 1962

Comes now the defendant by the undersigned attorneys and moves the Court to amend its order denying the defendant's motion for judgment on the pleadings in the above entitled action so as to certify, pursuant to the provisions of 28 U.S.C. 1292(b), that the Court is of the opinion that the Order denying defendant's motion for judgment on the pleadings involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, and that there is substantial ground for difference of opinion thereon, and that immediate

appeal from the said Order may materially advance the ultimate termination of the litigation.

A proposed form of order is submitted herewith for consideration of the Court.

Respectfully submitted,

David C. Acheson, United States Attorney; Nathan B. Lenvin, Attorney, Department of Justice; Kathleen M. Malone, Attorney, Department of Justice.

Consented to: David Rein, Attorney for Plaintiffs.

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

ORDER—Filed April 13, 1962

This cause came before the Court on defendant's motion for judgment on the pleadings. The Court, having heard counsel for the parties in open court, and having considered the pleadings and the memoranda filed by the parties, it is hereby

Ordered, adjudged, and decreed that said motion for judgment on the pleadings be and hereby is denied.

And the Court is of the opinion that this Order involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, and that there is substantial ground for difference of opinion thereon, and that immediate appeal from this Order may materially advance the ultimate termination of the litigation.

Edward M. Curran, U.S.D.J.

April 13, 1962.

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,989—September Term, 1961
District Court Civil Action 3729-61

ROBERT F. KENNEDY, Attorney General of the United States, Applicant,

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN, Respondents.

Before: Wilbur K. Miller, Chief Judge, and Fahy and Bastian, Circuit Judges, in Chambers.

ORDER—Filed May 11, 1962

Upon consideration of the application for permission to appeal from an interlocutory order of the District Court and of respondents' answer, it is

Ordered by the court that, pursuant to Section 1292(b) of Title 28 U.S.C., permission to appeal from the order of the District Court dated April 13, 1962 denying applicant's motion for judgment on the pleadings, be, and it is hereby, granted.

Per Curiam.

Dated: May 11, 1962

Circuit Judge Bastian dissents.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Plaintiffs,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

NOTICE OF APPEAL—Filed May 15, 1962

The United States Court of Appeals for the District of Columbia Circuit having granted on May 11, 1962, defendant's petition for leave to appeal in accordance with Section 1292(b) of Title 28 United States Code and Rule 9½ thereunder, the said defendant, Robert F. Kennedy, Attorney General of the United States, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered on April 13, 1962 in favor of the plaintiffs against the defendant, denying the defendant's motion for judgment on the pleadings.

Dated: May 15, 1962.

J. Walter Yeagley, Assistant Attorney General;
Nathan B. Lenvin, George B. Searls, Attorneys,
Department of Justice, Attorneys for Defendant.

To: David Rein, 711 14th Street, N.W., Washington, D. C.

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States, Appellant,

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN, Appellees.

Appeal from the United States District Court for the District of Columbia

OPINION—Decided April 4, 1963

Mr. George B. Searls, Attorney, Department of Justice, for appellant.

Mr. David Rein for appellees.

Before WILBUR K. MILLER, FAHY and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge: The Foreign Agents Registration Act[1] provides criminal penalties[2] against anyone who represents a foreign government in this country and fails to register with the Attorney General. Certain exceptions [fol. 31] are provided.[3] Appellees are attorneys at law representing the Republic of Cuba who have been requested by the Attorney General to register pursuant to the Act. Instead of registering, appellees filed this declaratory judg-

[1] 52 Stat. 631, as amended, 22 U.S.C. §§ 611 *et seq.*

[2] 52 Stat. 633, as amended, 56 Stat. 257, 22 U.S.C. § 618.

[3] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613.

ment action, alleging that since their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," they are exempt from registering under Section 3(d)[4] of the Act. They prey for a judgment so declaring. In effect, therefore, this proceeding is an effort to restrain the Attorney General from prosecuting appellees under the Act. The District Court denied appellant's motion for judgment on the pleadings and certified this action for appeal.[5]

The threshold question is presented by the venerable, but creaking, doctrine of sovereign immunity. There is no suggestion that the United States has consented to this suit or that the Attorney General is being sued as an individual. Indeed, the named defendant is "The Attorney General of the United States," the name of the current office holder not being included.[6] Consequently, the action, if maintainable at all, must fit the fiction created by *Ex parte Young*, 209 U.S. 123 (1908). There it was held that where an officer acts unconstitutionally, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. Since in such circumstances the officer is theoretically being sued as an individual, the doctrine of sovereign immunity provides no bar. Thus a fiction is indulged to circumvent sovereign immunity.

[fol. 32] *Ex parte Young, supra*, has spawned a welter of cases, all seeking to get under its umbrella.[7] The confusion which ensued has been to some extent relieved by the holding in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), reiterated in *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), that an officer of the United States may indeed be sued in his individual capacity where the officer's action is "not within the officer's statutory powers or, if within those

---

[4] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613(d).

[5] 28 U.S.C. § 1292(b).

[6] The Attorney General's name first appeared on the appeal papers in this court.

[7] See 3 Davis, Administrative Law, ch. 27 (1958).

powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U.S. at 702 and 369 U.S. at 647.

It is not alleged in the complaint that prosecution of the appellees under the Act would be unconstitutional[8] or outside the Attorney General's statutory powers.[9] Appellees' [fol. 33] primary argument on the unconsented suit point seems to be that "the doctrine that a suit against a government officer in his official capacity may be a suit against the United States applies only in the situation where the suit is either for government funds or for specific property in the possession of the government." We are not aware

---

[8] In arguing that this is an appropriate case for declaratory judgment, appellees assert that the penalties are so severe that they dare not await prosecution. Therefore, they assert, a civil forum must be available or the Act can never be tested. A civil forum may be available under these circumstances, for this argument may raise a constitutional question. *Yakus* v. *United States*, 321 U.S. 414, 438 (1944); *Ex parte Young, supra*, 209 U.S. at 145-148. Appellees, aided by competent counsel, for reasons best known to themselves, have decided not to raise the constitutional issue. Under the circumstances, and for the purposes of this motion, we accept appellees' pleadings as presented.

[9] Appellees do argue in their brief that their activities "are expressly exempted from the Act by the terms of the Act itself" and that to this extent appellant's demand that they register is "in excess of his statutory authority." The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, appellees' claim is that appellant has erred, or will err, in construing the law. But the relief for which appellees here pray "can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson* v. *Domestic & Foreign Corp., supra*, 337 U.S. at 690. See also *United States* v. *Thompson*, 251 U.S. 407, 413 (1920); *Goldberg* v. *Hoffman*, 7 Cir., 225 F.2d 463 (1955); *Fay* v. *Miller*, 87 U.S.App.D.C. 168, 171, 183 F.2d 986, 989 (1950); *United States* v. *One 1940 Oldsmobile Sedan Automobile*, 7 Cir., 167 F.2d 404 (1948); *District of Columbia* v. *Buckley*, 75 U.S.App.D.C. 301, 304, 128 F.2d 17, 20 (1942), *cert.* denied, 317 U.S. 658 (1942); *United States* v. *Segelman*, W.D. Pa., 86 F.Supp. 114 (1949); *United States* v. *Brokaw*, S.D. Ill., 60 F.Supp. 100 (1945).

that the doctrine of sovereign immunity is so circumscribed. If "the 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would • • • interfere with the public administration," the suit is one against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), citing *Ex Parte State of New York, No. 1*, 256 U.S. 490, 500, 502 (1921).[10] Obviously, restraining the Attorney General from enforcing the criminal laws of the United States would "interfere with the public administration."

Appellees rely heavily on Professor Borchard in arguing that civil procedure should be substituted for criminal procedure in the area not involving moral turpitude, particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." Borchard, Declaratory Judgments (2d Ed. 1941), p. 1021. They also assert with Professor Borchard "that one of the main and [fol. 34] most beneficial functions of declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices." Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned. Consequently, since appellees have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States.

So ordered.

FAHY, Circuit Judge, dissenting: The suit does not seem to me to be one to enjoin a criminal prosecution, which equity ordinarily will not entertain. The Foreign Agents Registration Act is not such a criminal statute as is involved in cases which illustrate the equitable doctrine. It is primarily a regulatory statute, with a penalty of not more than $10,000 fine, or imprisonment for not more than five years, or both, for willful violation of any of its pro-

---

[10] See also *Larson* v. *Domestic & Foreign Corp., supra*, Note 9, at 688; *Stanley* v. *Schwalby*, 147 U.S. 508 (1893); *Reisman* v. *Caplin*, —— U.S.App.D.C. ——, —— F.2d —— (No. 16,690, decided 2/7/63), p. 4, slip opinion.

visions. Section 618(a). It is not a crime to be a foreign agent, but to act as one unless a specified registration statement is filed, or unless one "is exempt from registration under the provisions of this subchapter." Section 612(a). Appellees allege that they are within the statutory exemption of "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal. . . :" Section 613(d). They allege that they are lawyers and that their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," that their retainer does not cover advice or repre- [fol. 35] sentation involving public relations, propaganda, lobbying, or political or other non-legal matters, and that they have not advised, represented, or acted on behalf of Cuba in any such matters. The answer of appellant alleges that he does not have sufficient information to form a belief as to the truth of these allegations respecting matters other than legal. Appellant denies, however, that appellees come within the exemption and has insisted that they file the registration statement. In this situation the District Court, I think properly, denied appellant's motion for judgment on the pleadings.

Since the Attorney General is responsible for administering and enforcing the statute, appellees were under the necessity either of filing the detailed information required by a registration statement and acquiescing in the status attributed to them by appellant, or of being criminally prosecuted and risking the statutory penalties, unless they could secure a declaratory judgment as to their status. There is more in this situation than the impact upon appellees of the mere existence of the statute, and more too than a mere difference of opinion. There is a demand and insistence by appellant that they file the registration statement. A case or controversy—a justiciable issue—thus arose. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

The suit is not accurately described as one to enjoin a criminal prosecution. It is to determine the existence of an obligation on appellees' part affirmatively to register in

circumstances which create a justiciable issue in that regard. No administrative remedy is provided and there is no remedy at law comparable in adequacy to that available through the Declaratory Judgment Act. See *Greene* v. *McElroy*, 360 U.S. 474 (1959). The Act combines with equity to afford a remedy, for equity is served by not forcing registration in the face of well-founded doubt of the need to do so, until that doubt is resolved—a doubt which [fol..36] we must assume in the present posture of the case is held in good faith. See *Terrace* v. *Thompson*, 263 U.S. 197 (1923). The thrust of the suit is presently too far removed from an effort to enjoin a criminal prosecution to come within the principle adverted to under which equity sometimes denies itself jurisdiction. This principle long antedated the Declaratory Judgment Act and when now invoked should be considered in conjunction with that Act.[1]

Nor, as it seems to me, is the suit one against the United States within the sovereign immunity doctrine which protects the Government, without its consent, from judicial interference in the disposition of its property or in its appropriate functioning. *Reisman* v. *Caplin*, —— U.S. App. D.C. ——, —— F.2d —— (1963). The American approach to this doctrine has not precluded suits against officials acting in excess of constitutional or statutory authority. See, *e.g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Appellees do not claim, however, that the statute is unconstitutional, so the question narrows to whether the effort of the appellant to require appellees to register is within his statutory authority as that concept has been used in defining the sovereign's

---

[1] Appellant cites *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), and *Watson* v. *Buck*, 313 U.S. 387 (1941), both of which, however, involved efforts to have a federal court enjoin state action, which turn upon different considerations. Nor are *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), also cited, controlling, because no real controversies were presented for declaratory judgment in those cases (except of course as to the federal employee in *Mitchell* who alleged that he had been engaging in political activity said to be covered by the Act).

immunity. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Attorney General has general authority and responsibility for administering this stat-
[fol. 37] ute as well as for enforcing federal law generally. But there is a question—a judicial question—on the pleadings in this case as to his authority to require appellees to register. True it is that his insistence that they do so is within his authority in the sense that he is entitled to make a decision bearing upon his administration of the statute, as officials generally are entitled to do in carrying out their responsibilities; but even though such a decision becomes a first step in setting in motion the processes of government, when it gives rise to a controversy such as we have here the basis for the immunity disappears.[2] For in such circumstances a suit against an officer of the United States neither affects the disposition of property as in *Larson* nor, as in *Reisman*, interferes in an unwarranted manner with the functioning of government (the "public administration" of *Land* v. *Dollar*, 330 U.S. 731 (1947)).

Unlike the situations in either *Larson* or *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), this suit does not require the appellant to do or not to do anything. In *Larson* an injunction was sought prohibiting the Administrator of the War Assets Administration from selling certain property to anyone but plaintiff, who claimed to have a valid contract to buy it from the Administrator. The Court referred to "no allegation of any statutory limitation" on the Administrator's powers as a sales agent. In *Malone* the action sought to eject a Government officer from land which he occupied under claim of title from the United States. Referring to *Larson* the Court pointed out that there "the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers." In our case appellees rely upon a congressionally built-in exemption which is a limitation upon the statutory authority of appellant.

---

[2] The existence of a justiciable controversy does not fall away because the decision has not been pursued further during the pendency of this litigation.

[fol. 38] The suit is designed to ascertain what the statute contemplates. If appellees are held to come within the exemption the law is vindicated. If they are found not to come within the exemption appellant remains free to proceed as he deems advisable. In neither case does the suit seek to require appellants to act affirmatively, to surrender property, or even to stay his hand except as understandable self-restraint leads him to do so at present. The Government does not contend that declaratory judgments may never be entered against officers of the United States or that an express consent to be sued is always necessary. See *Gregue* v. *McElroy, supra,* where there was no discussion of the immunity doctrine; *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* where the Court sustained jurisdiction and negated the possibility of immunity; and *United Public Workers* v. *Mitchell, supra.*[3]

The exemption provision is contained in the statute itself and must be construed howsoever the status of appellees is determined. For this purpose the Declaratory Judgment Act is peculiarly appropriate. Of course that Act is not a waiver of sovereign immunity, but it is a means of determining the issue upon the resolution of which the application of the immunity turns.

The lines of the immunity doctrine are elusive. As this court suggested in *Reisman,* policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanc-[fol. 39] tions when the dispute arises out of a regulatory statute like the one before us.[4] As indicated above the dis-

---

[3] The Supreme Court has said: "Courts of Justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government . . ." *United States* v. *Lee,* 106 U.S. 196, 220 (1882).

[4] A leading authority has indicated that courts have been too uncritical and unanalytical in their application of the doctrine,

pute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment. I would therefore affirm.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil 3729-61

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States, Appellant,

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN, Appellees.

Appeal from the United States District Court for the District of Columbia

Before: Wilbur K. Miller, Fahy and Wright, Circuit Judges.

JUDGMENT—April 4, 1963

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

---

with its exceptions created in *Ex parte Young*, 209 U.S. 123 (1908). See 3 *Davis, Administrative Law*, pp. 545-576 (1958).

In his dissenting opinion in *Larson*, Mr. Justice Frankfurter took occasion to say: "'Sovereign Immunity' carries an august sound. But very recently we recognized that the doctrine is in 'disfavor'. [Citing *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940)]. It ought not to be extended . . ." 337 U.S. at 723.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reserved, and that this cause be, and it is hereby, remanded to the District Court with directions to dismiss the case on the pleadings as an unconsented suit against the United States.

Per Circuit Judge Wright.

Dated: April 4, 1963.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 41] Petition for rehearing covering 12 pages filed April 18, 1963 omitted from this print. It was denied, and nothing more by order. May 1, 1963.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,105—September Term, 1962

ROBERT F. KENNEDY, Attorney General of the United States, Appellant,

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN, Appellees.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—May 1, 1963

On consideration of appellees' petition for rehearing en banc, it is

Ordered by the court en banc that the petition is hereby denied.

Per Curiam.

[fol. 51] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 52]

SUPREME COURT OF THE UNITED STATES

No. 287—October Term, 1963

VICTOR RABINOWITZ, et al., Petitioners,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

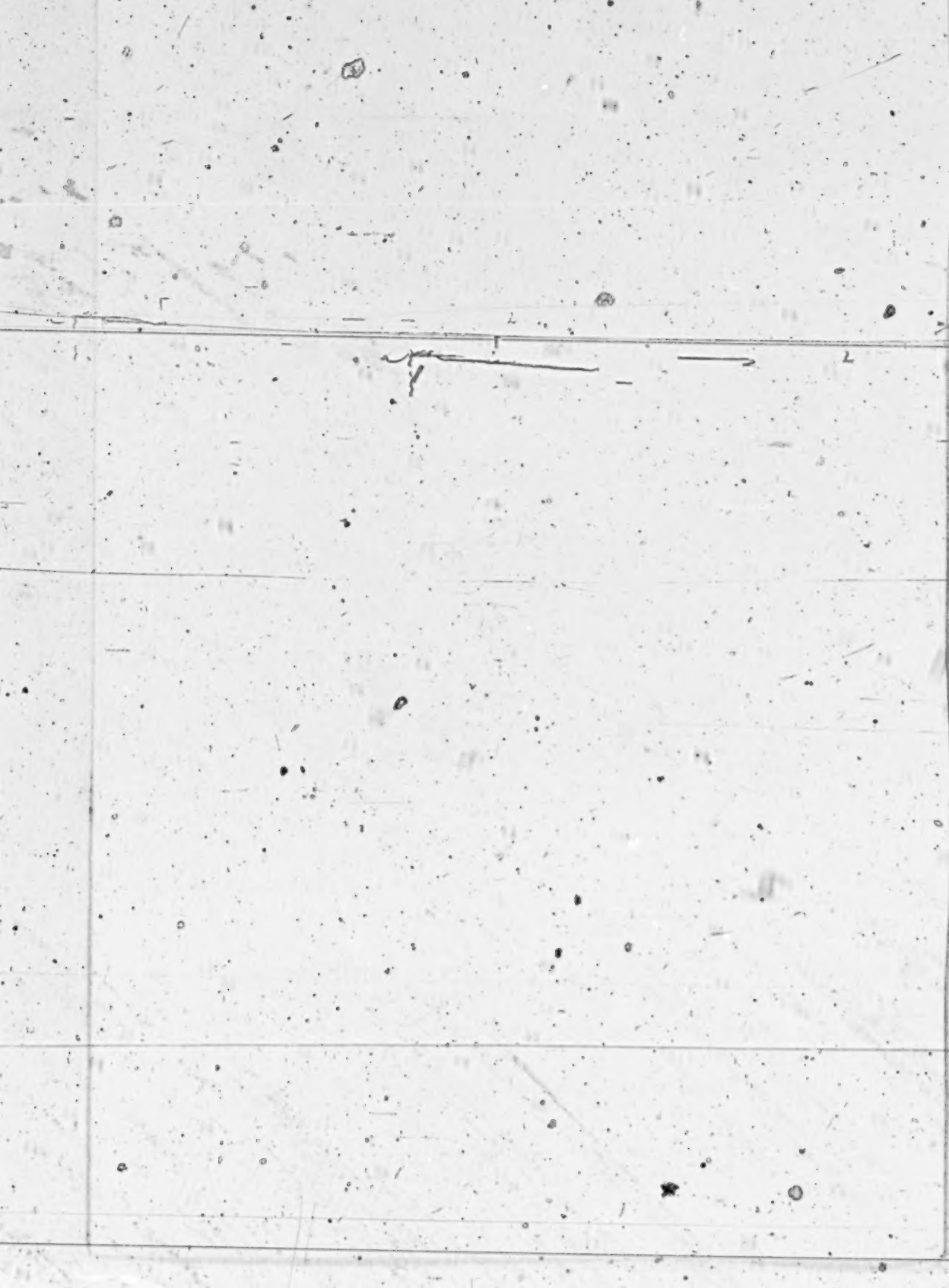
v.

ROBERT F. KENNEDY, *Attorney General of the United States*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID REIN
711 14th St., N. W.
Washington, D. C.
Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

CASES CITED

STATUTES, RULES AND LEGISLATIVE MATERIALS

TREATISES AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, *Attorney General of the United States*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed a judgment of the United States District Court for the District of Columbia denying respondent's motion for judgment on the pleadings.

OPINION BELOW

The District Court issued no opinion. The opinion of the Court of Appeals has not as yet been reported and is appended hereto as Appendix A. The judgment is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1963 (R. 48). A timely petition for rehearing was denied on May 1, 1963 (R. 47). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners, a law firm who represent a foreign government in purely mercantile and financial matters, and accordingly, are not required to register under the Foreign Agents Registration Act, may bring a declaratory action to challenge the Attorney General's demand that they register under that Act; or whether they are relegated to the alternatives of complying with the unlawful demand or submitting themselves to the hazards of an indictment and prosecution for failing to register.

2. Whether such a declaratory judgment action is a suit against the United States.

STATUTES INVOLVED

Foreign Agents Registration Act (Act of June 8, 1938; 52 Stat. 634; 22 U.S.C. 611 et seq., as amended: Section 611(a)):

As used in and for the purpose of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

* * * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

(2) any person who within the United States collects information for or reports information to a foreign principal; who within the United States solicits or accepts compensation, contributions, or loans, directly or indirectly from a foreign principal; who within the United States solicits, disburses, dispenses, or collects compensation, contributions, loans, money, or anything of value, directly or indirectly, for a foreign principal; who within the United States acts at the order, request, or under the direction of a foreign principal;

* * * * * *

Section 612

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this section 2(a) and section 2(b) hereof or unless he is exempt from registration under the provisions of this subchapter.

Section 613

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals;

* * * * * *

(d) Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal

* * * * * * *

Section 618

(a) Any person who—

(1) Willfully violates any provision of this subchapter or any regulation thereunder,

* * * * * *

(2) . . . shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Declaratory Judgment Act (62 Stat. 964 as amended; 28 U.S.C. 2201):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

The petitioners are members of the bar of the State of New York, engaged in the general practice of law under the firm name of Rabinowitz & Boudin. On or about September 10, 1960, petitioners were retained by the Republic of Cuba to represent that government in purely mercantile and financial matters; their retainer does not cover advice and representation involving public relations, propaganda, lobbying or political or other non-legal matters and the petitioners have not in fact represented the Republic of Cuba in any respect other than in mercantile and financial matters (R. 4-5).

In August of 1961, the respondent, the Attorney General, demanded that petitioners register with him in accordance with the provisions of the Foreign Agents Registration Act of 1938, as amended, herein called the Act. The petitioners maintained that their representation of the Republic of Cuba did not fall within the purview of the Act and so informed respondent. The respondent, nevertheless, insisted and continues to insist on his demand that petitioners register (R. 5).

Thereafter, the petitioners filed in the District Court below a complaint for a declaratory judgment declaring that their activities as representatives of the Republic of Cuba as set out in the complaint and as described above do not subject them to the requirements of registration under the Act (R. 4-7). The complaint alleged (R. 6) that these activities do not fall within the purview of the Act and are specifically exempted from the registration requirement of the Act by section 3(d) thereof, 22 U.S.C. § 613(d).

Attached to the complaint as Exhibit A (R. 8-16) is the registration form adopted by the Attorney General

and which petitioners would be required to complete in order to fulfill the registration requirements of the Act. This form would require petitioners to disclose all of their businesses, occupations and public activities without regard to any relationship of these activities to their representation of the Republic of Cuba. Petitioners would be required to list all of their law clients and any other outside activities which they may have outside their law business and all talks, speeches, radio broadcasts which they may have made or articles or books which they may have written. The form also would require the petitioners to list all of their stockholdings or any other pecuniary interests in any corporation or any business enterprise, again without regard to whether or not these corporations or business enterprises had any relation to the representation of the foreign principal.

The complaint further alleged (R. 5) that the petitioners found it necessary to retain counsel in other states in connection with litigation in courts throughout the country. Attached to the complaint as Exhibit B was the Attorney General's Form No. FA-4 (R. 17-19) which respondent would require to be filed by all counsel associated with petitioners. This form would require all associate counsel to disclose all visits to [redacted] residences in foreign countries within the past 5 years; all clubs, societies, committees or other non-business organizations in the United States or elsewhere, of which they have been members, directors, officers or employees during the past 2 years; a brief description of all other businesses, occupations or business activities in which they are engaged; all speeches, lectures, talks, radio and television broadcasts delivered during the past 3 months and "all newspapers,

magazines, articles, books, pamphlets, press releases, radio and television programs and scripts, and other publications distributed by them or by others for them, or in the preparation and distribution of which [they] rendered any services or assistance, during the past 6 months."

The complaint alleged that this registration requirement constituted a serious invasion of petitioners' privacy and that it would interfere with the petitioners' practice of law since other lawyers whom they would wish to employ or retain might refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 6). The complaint concluded that the petitioners were faced with the dilemma of submitting themselves to this unlawful invasion of their privacy as a result of the unlawful demand of the Attorney General or in the alternative, resisting the demand and facing indictment and prosecution and possibly even conviction, if they were wrong in their judgment as to the law, for refusing to register. The complaint further alleged that indictment and prosecution, even without more, would seriously damage petitioners' reputation and interfere with their practice of law and their ability to employ and retain associate counsel (R. 6).

The Attorney General filed an answer in which he admitted that petitioners had been retained to represent the Republic of Cuba in its mercantile and financial interests, but denied any knowledge as to whether or not the representation went beyond the mercantile and financial interests of the foreign principal (R. 22). The answer further admitted that the Attorney General had demanded that petitioners register under the Foreign Agents Registration Act, that he had rejected

petitioners' claim that they do not fall within the purview of the Act, and that he continued to insist that petitioners register. The answer further alleged that the failure of the petitioners to register as demanded subjected them to indictment, prosecution, and the imposition of criminal penalties (R. 22). The answer also specifically put in issue the legal question as to whether or not the activities of petitioners brought them within the purview of the Act (R. 22).

Respondent then moved for judgment on the pleadings, and his motion was denied by the trial court (R. 24-5). Subsequently, on respondent's motion consented to by the petitioners, the trial court amended its order, certifying, in accordance with 28 U.S. Code § 1292(b) that its order "involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, . . . and that immediate appeal of this order may materially advance the ultimate termination of the litigation." (R. 27.) Thereafter the Court granted respondent's application for permission to appeal from the District Court's order (R. 28), and reversed that order, holding that petitioners' action was a suit against the United States, Judge Fahy dissenting (R. 30-39). A timely petition for rehearing en banc (R. 40-46) was denied (R. 47).

REASONS FOR GRANTING THE WRIT

1. The decision below expanded the doctrine of sovereign immunity to an unprecedented degree and applied it in a fashion inconsistent with the decisions of this Court. Since the District of Columbia is the forum for the bulk of the litigation challenging the

validity of actions by government officials, the application of the sovereign immunity doctrine by the Court of Appeals for the District is of special importance.

According to the ruling of the majority below, except in the case of a challenge to the constitutionality of a statute, no suit can ever be brought against a government official which might affect a criminal prosecution. The majority regarded this as an inflexible rule which must be applied in all cases, regardless of the equities of the suit and all other considerations, legal or policy, which might justify bringing the action. According to the majority, such a suit is one against the sovereign because it would "interfere with the public administration." The majority cited no authority either in this Court or in any other court for this extreme view. On the contrary, its decision is directly contrary to the decision of this Court in *Shields* v. *Utah Idaho R. R. Co.*, 305 U.S. 177. That case involved a challenge to a finding by the Interstate Commerce Commission that a railroad came within the scope of the Railway Labor Act. Under the statutory scheme, the railroad, if subject to the Act, was required to post certain notices, and the failure to do so subjected it to criminal penalties. The railroad sued to enjoin the United States Attorney from prosecuting it. The lower courts and this Court entertained jurisdiction of the action, the Court stating as follows at 183:

> "Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted,

> even though the complaint seeks to enjoin the bringing of criminal actions. . . . [W]e think respondent was entitled to resort to equity in order to obtain a judicial review of the validity and effect of the Commission's determination purporting to fix its status."

The Court did not consider that the doctrine of sovereign immunity or of a suit against the United States was even present in the case, although there was no question that the suit was being brought against the United States Attorney in his official capacity.[1]

Moreover, the lower court's unthinking application of the formula that suits are barred as unconsented suits against the United States where a judgment might "interfere with the public administration"[2] cannot possibly be squared with the number of cases in which both this Court and the court below have taken jurisdiction of suits challenging the validity of action by government officials. On the contrary, ever since

---

[1] Despite the clear contradiction between the *Shields* case and the ruling of the court below, the court made no effort to discuss or distinguish the case. This can hardly have been due to an oversight, since the case was cited to the court and, in accordance with its Rule 17(b)(3) marked with an asterisk as a case chiefly relied upon by petitioners.

[2] The phrase was taken from an opinion of Justice Douglas which rejected the defense of sovereign immunity, *Land* v. *Dollar*, 330 U.S. 731, 738. Nothing in the context of that case, or in any other case in this Court, justified the application given to the formula by the court below. Compare the prophecy made with respect to similar language employed in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682: "The use of mechanical and unrealistic language, as in *Larson*, presents the danger that lower courts will rely on words and ignore underlying policies." *Sovereign Immunity and Specific Relief Against Federal Officers* (Note) 55 Colum. L. Rev. 74, 82. Unfortunately, this prophecy was fulfilled in the present case.

this Court's decision in *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, it has been accepted without question that the courts have jurisdiction over suits challenging the validity of actions taken by government officials. And in *Stark* v. *Wickard*, 321 U.S. 288, this was referred to as "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy."

Applying that "familiar principle", both this Court and the court below have, as a matter of course, assumed jurisdiction of multifarious suits challenging the validity of actions by government officials and indistinguishable in principle or theory from the present case. See e.g. action challenging the application of a test which would exclude the import of tea, *Waite* v. *Macy*, 264 U.S. 606; actions challenging the refusal of the Secretary of State to issue passports, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; suits challenging the validity of the discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363, *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 338; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Deak* v. *Pace*, 185 F. 2d 997; *Born* v. *Allen*, 291 F. 2d 345; or the validity of a resignation from the Air Force, *Ingalls* v. *Zuckert*, 309 F. 2d 659; an action challenging the character of an Army discharge, *Harmon* v. *Brucker*, 355 U.S. 579; an action challenging the authority of the Civil Service Commission to classify hearing examiners, *Ramspeck* v. *Fed. Trial Examiners*, 345 U.S. 128; an action challenging the validity of regulations giving veterans priority in retention in the government service, *Hilton* v. *Sullivan*, 334 U.S. 323; actions challenging the leases

of public lands *Chapman* v. *Sheridan-Wyoming Coal Co.*, 328 U.S. 621; *Morgan* v. *Udall*, 306 F. 2d 799; *Carl* v. *Udall*, 309 F. 2d 653; an action challenging discretionary action by a Parole Board, *Davis* v. *Board of Parole*, 306 F. 2d 801.

All of these were cases in which the government officials were sued in their official capacity, and in which judgments for the plaintiffs would unquestionably have "interfered with the public administration." Nevertheless, jurisdiction was assumed without question and without discussion of the question of sovereign immunity. The court below, however, made no effort to distinguish the general run of cases in which jurisdiction was assumed from the present case, or to indicate the considerations either of policy or logic which would justify the exercise of jurisdiction in those cases but not in the present.

Significantly, in many of these cases, the relief requested was denied, the court holding that the challenged action was validly taken. Under abstract logic, a holding that the action of the government official was validly authorized implies that it was the action of the sovereign, and theoretically, the court could have dismissed the action for lack of jurisdiction because of sovereign immunity. However, since under this view, the question of sovereign immunity and the lawfulness of the government official's action was the same question, the courts wisely dispensed with such semantics.[8]

---

[8] See Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1480-1 (1962). See also Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 88, 77th Cong., 1st Sess. 80-82 (1941).

The doctrine of sovereign immunity has its impact only where it bars, as in the present case, consideration as to whether the challenged governmental action was valid. We pointed out to the court below that this Court has applied or considered the doctrine in that manner only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government, see, e.g., *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Land* v. *Dollar*, 330 U.S. 731; *Larson* v. *Domestic & Foreign Corporation*, 337 U.S. 682. That the doctrine is so limited was recognized by this Court in its most recent case on the subject, *Malone* v. *Bowdoin*, 369 U.S. 643, 646, 649-50; cf. *Ickes* v. *Fox*, 300 U.S. 82. And even the court below has on more than one occasion recognized that the doctrine was limited to cases of this character. See *Clackamas County, Ore.* v. *McKay*, 219 F. 2d 479, 491; *Story* v. *Snyder*, 184 F. 2d 454, 456; *Udall* v. *States of Wisconsin, Colorado, and Minnesota*, 300 F. 2d 790, 792; *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582. The same view has been taken by numerous commentators in the field.[4]

However, without any analysis of the cases, the court below blandly rejected the contention with the statement: "We are not aware that the doctrine of sovereign immunity is so circumscribed;" citing four

[4] See Byse, *op. cit. supra* at 1485-6, 1528; Comment, 8 Stanford Law Rev. 683, 684-6 (1956); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3, 19-20 (1954); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Actions* (Note), 2 U.C.L.A. Law Rev. 382, 383 (1955). See also *Farrell* v. *Moomau*, 85 F. Supp. 125.

cases in this Court which in fact involved suits either for government funds or for specific property in the possession of the government.[5] The only case relied upon which does not fall in that category was a recent decision of the Court of Appeals, *Reisman* v. *Caplin*, 317 F. 2d 123. In the *Reisman* case, the court found that an action against the Commissioner of Internal Revenue was an unconsented suit against the United States because it was prematurely brought, intimating that the result might be different if the plaintiff's only recourse were a suit against the Commissioner. Although the lower court's decision in *Reisman* appears to have been based on a complete non sequitur,[6] it should be contrasted with the decision in the present case which is based on no reasoning at all and in which petitioners are denied relief, although their action is not premature and they have no other available remedy.[7] Significantly, Judge Fahy who was the author of the opinion in the *Reisman* case, dis-

[5] The cases cited were *Land* v. *Dollar, supra; Ex Parte State of New York, No. 1*, 256 U.S. 490; *Larson* v. *Domestic & Foreign Commerce Corp., supra;* and *Stanley* v. *Schwalby*, 147 U.S. 508.

[6] Obviously, if a case is prematurely brought, it should be dismissed on that ground, and not on the ground of sovereign immunity.

[7] Cf. the similar non-sequitur of the Court of Appeals in *Fay* v. *Miller*, 183 F. 2d 986. In this latter case, the court held that a suit to restrain action by the U.S. Attorney was an unconsented suit against the United States, because plaintiffs were able to obtain all necessary relief through a suit against a third party. In the *Fay* opinion, the court reasoned that *Larson* was held to be an unconsented suit against the United States because the plaintiffs there had an adequate remedy in the Court of Claims. If, as intimated in the *Fay* case, the sovereign immunity doctrine is applicable only when a plaintiff has some other adequate remedy then it should not have constituted a bar to relief in the present case.

sented in the present case. More significantly, two other circuits have considered the claim of sovereign immunity in situations identical to that of *Reisman* to be completely without substance, *De Masters* v. *Arend*, 313 F. 2d 79; *Application of Colton*, 291 F. 2d 487, and on June 17, this Court granted certiorari in the *Reisman* case, No. 1084, Oct. Term, 1962.[8]

This Court has repeatedly observed that the doctrine of governmental immunity from suit is in disfavor, and that accordingly the general trend is to narrow the scope of the doctrine, see e.g. *Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 391; *National City Bank* v. *Republic of China*, 348 U.S. 356, 359, a view shared by virtually all commentators in the field, see e.g. Byse, *op. cit. supra;* 3 Davis, *Administrative Law Treatise* (1958) ch. 27; Gellhorn & Byse, *Administrative Law Cases & Courts* (4th ed. 1960) 354-5; Comment, 8 Stanford Law Review 683, 692-3 (1956); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3, 25, 35-39 (1954); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity* (1953), 13 La. L. Rev. 476; Davis, *Suing the Government by Suing An Officer*, 29 U. of Chi. L. Rev. 435 (1962); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 420, 433 (1958); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev.

---

[8] On the common issue in *Reisman* and the present case, the government's opposition to the petition for a writ of certiorari stated only the following (at p. 6): "The court of appeals held that petitioners' action was barred by sovereign immunity. This holding admittedly raises questions of some difficulty."

1, 17 (1959). In the light of this trend to restrict the doctrine, the lower court's expansion of the doctrine was especially unwarranted. Moreover, any expansion of the doctrine should be done only on the basis of some rational and significant policy considerations, and not on the basis of a mechanical application of an inapplicable formula, as was done below.[9]

As matters now stand, all that can be said of the doctrine as applied by the court below, is that sometimes it bars suits and sometimes it doesn't, and one guess is as good as another. There are no criteria and no grounds for determining when the doctrine applies and when it doesn't; the cases are apparently resolved on the basis of whim or caprice.[10]

Obviously the question as to when a suit against a government official must be dismissed for lack of juris-

---

[9] See *Malone* v. *Bowdoin*, *supra* at 650 (dissenting opinion); Byse, *op. cit. supra* at 1530; Gellhorn & Byse, *op. cit. supra* at 354-5.

[10] Subsequent to its decision in the present case, the court below, without discussion of the question of sovereign immunity, assumed jurisdiction of a suit against the Secretary of Defense by a group of Navy employees who asked the court to hold that they were entitled to be transferred to certain jobs in the Navy Department, *McNamara et al.* v. *Dick et al.*, No. 17,216, decided May 16, 1963. Granting the relief requested would unquestionably have "interfered with the public administration" of the Navy Department. The court, nevertheless, considered the question on the merits and, reversing the district court, held that, under the applicable statutes and regulations, the employees were not entitled to the jobs to which they laid claim. See also *Division 1267 etc.* v. *Ordman*, No. 17,649, decided June 13, 1963, in which the court held that the General Counsel of the Labor Board had not abused his discretion by refusing to issue a complaint, and *Josey* v. *Board of Parole*, No. 17,243, decided June 13, 1963, in which the court directed the Board of Parole to hold a hearing.

diction because it is an unconsented suit against the United States is a vital and important one which requires clarification by this Court.

2. The lower court not only extended the sovereign immunity doctrine to a new and unprecedented area, but it applied the doctrine in a novel and unprecedented fashion. In the *Larson* case, this Court held that the sovereign immunity doctrine will not bar a suit which challenges the government official's action as being beyond his statutory powers, although it will bar a suit when the action taken is within the official's powers even if the action involved an error of law. This test is admittedly difficult to apply,[11] but it does permit the

[11] For critisims of the test as being unrealistic and almost impossible to apply in practice, see Byse, *op. cit. supra* at 1485-8; Gellhorn & Byse, *Administrative Law Cases & Courts* (4th ed. 1960) 354-55; Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis* (1960) 9 J. Pub. L. 1, 12-13; Jaffé, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 433-437; Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev. 1, 15-17 (1959); Davis, *Suing the Government by Suing an Officer*, 29 U. of Chi. L. Rev. 435 (1962); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3 (1954). And from the very inception of the doctrine, this Court has consistently noted that its own decisions in the field could not be reconciled. See *Cunningham* v. *Mason & Brunswick R.R. Co.*, 109 U.S. 446, 451; *Brooks* v. *Dewar*, 313 U.S. 354, 359-60; *Land* v. *Dollar*, 330 U.S. 731, 738; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698. The most recent comment on this point was in the dissenting opinion in the *Malone* case, *supra* at 650:

> "This Court is quite correct in saying that all of our decisions in this field cannot easily be reconciled; and the same will doubtless be true if said by those who sit here several decades hence."

For a discussion of the cases and their inconsistencies, see 3 Davis *Administrative Law Treatise* (1958), Ch. 27, pp. 545-616.

courts to entertain some suits against governmental officials. But, as interpreted by the court below, in the absence of a challenge to the constitutionality of a statute, virtually every case brought against a government official would be barred by the sovereign immunity doctrine.

The present action was brought against the Attorney General in his capacity as the government official charged with the administration of the Foreign Agents Registration Act. Petitioners alleged that since the Act expressly exempted the petitioners' activities from its coverage, the respondent's demand that they register exceeded his statutory authority.[12] To this, the court below replied that the respondent, as Attorney General, had the statutory authority to construe the statute and that included the authority to construe it erroneously. If this reasoning is to prevail, no case

---

[12] The contention of the majority below that the complaint did not allege that the Attorney General had exceeded his statutory powers is plainly both captious and inconsistent with Rule 8(f) of the Federal Rules of Civil Procedure which provides that "All pleadings shall be so construed as to do substantial justice." See *Maty* v. *Grasselli Chemical Co.*, 303 U.S. 197, 200; *Conley* v. *Gibson*, 355 U.S. 41, 48; 2 Moore's Federal Practice (2d ed.) 1895. The complaint plainly alleged that petitioners were expressly exempted from the requirement of registration under the Act (R. 6). Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, there was certainly no need for petitioners to add to their complaint the legal argument that because they were expressly exempted from the Act, therefore the demand for their registration exceeded the statutory authority granted by the Act to the Attorney General. "The Federal Rules have done away with the narrow 'theory of the pleadings' doctrine . . . . [A] party is not required to pick and stick to one theory of law," 2 Moore's Federal Practice (2d ed.) 1713-14. The validity of a complaint must be judged on the basis of the facts alleged, not on how it argues the law.

can ever be brought in which the claim that a government official acted outside his authority can be sustained. Every government official has the authority and responsibility to construe, in the first instance, the statutory powers conferred upon him. And it may be assumed that in all cases where the claim is made that he is exceeding his authority, the official is in good faith contending that he is not, and the issue is an arguable one that requires judicial resolution. But the formula adopted by the court below that the official has the statutory authority to construe his statutory authority erroneously would in effect preclude all judicial review and oust the courts of jurisdiction at the threshold.[13]

Admittedly the formula of the *Larson* case is ambiguous and difficult of application. But as applied below, the formula has no content whatever and would serve to bar any suit against a government official.

3. The decision below nullifies the Congressional intent as expressed in the Declaratory Judgment Act. As shown by the dissenting opinion, the present case meets all the requirements for declaratory relief as provided for in the Act. And the legislative history of

---

[13] This view that a good faith construction of his statutory powers exempts a government official from judicial review of the validity of his actions was rejected by this Court as long ago as 1902, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110-11:

> "Although the Postmaster General had jurisdiction over the subject-matter . . . and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such a decision, being a legal error, does not bind the courts."

Cf. *Wilbur* v. *United States ex rel Krushnic*, 280 U.S. 306; *Harmon* v. *Brucker*, 355 U.S. 579.

the Act shows that it was designed to cover just such cases as the present.[14]

In an article reviewing the early history of the Declaratory Judgment Act, Prof. Borchard, who is generally acknowledged as the author of the Act[15] wrote as follows (Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 461 (1943)):

> "Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law, involv-

[14] See S. Rep. 1005, 73rd Cong. 2d Sess., pp. 2-3:

"The [Declaratory Judgment] procedure has been especially useful in avoiding the necessity, now so often present of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin*, (284 Ill. 389, 120 N.E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S.W. 565, 1927) where a declaratory judgment under such circumstances was issued and settled the controversy."

And page 6 of the Report quoted with approval as underlying the purposes of the Declaratory Judgment Act the language of this Court in *Terrace* v. *Thompson*, 263 U.S. 197, 216:

> "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."

[15] See .e.g. S. Rep. 1005 cited *supra* at p. 2.

> ing the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right on the other, make this field of controversy peculiarly susceptible to the expeditious and pacifying ministration of the declaratory judgment. . . . The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen avoid by construing and interpreting inhibiting statutes in a civil proceeding where possible."[16]

With regard to the applicability of the Declaratory Judgment Act to the present case, the majority below stated: "Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned." The opinion, however, does not state where or how Congress has so "decreed." There is in fact, no Congressional action which bars relief for petitioners. On the contrary, Congress intended such a remedy under the Declaratory Judgment Act, and the only bar to relief is the action of the court below.

Nor are there any equitable considerations which can justify the denial of relief. The Attorney Gen-

---

[16] See also Borchard, *Declaratory Judgment* (2d ed. 1941) 906, 1020-1021; Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 40, 43, 49-50 (1934). For an exhaustive discussion of the cases involving suits for injunctive or declaratory relief and challenging the validity or applicability of penal statutes, see the two part article by Professor Davis, Davis, *Ripeness for Judicial Review*, 68 Harv. L. Rev. 1122, 1327 (1955), particularly 1145-1153. Prof. Davis distilled from the cases the following rule: Except where the case is otherwise not ripe for judicial review, "A statute or a regulation which is enforceable through criminal prosecution should be subject to challenge in a suit for injunction or declaratory judgment brought by a party who is immediately confronted with the problem of complying or violating; risk of criminal penalties should not be exacted as the price of challenge," at 1368.

eral is not entitled to, nor should he desire petitioners' registration if they are not required to register under the terms of the Act. And if the petitioners have been, as we contend,[17] expressly exempted by Congress from the coverage of the Act, it does not "interfere with the public administration" for a court so to declare. On the other hand, there is certainly no equity in the argument that petitioners should be compelled to register, even though the law does not require them to, under a threat of a criminal prosecution without first being afforded the opportunity of obtaining a judicial declaration on the validity of respondent's demand that they register.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

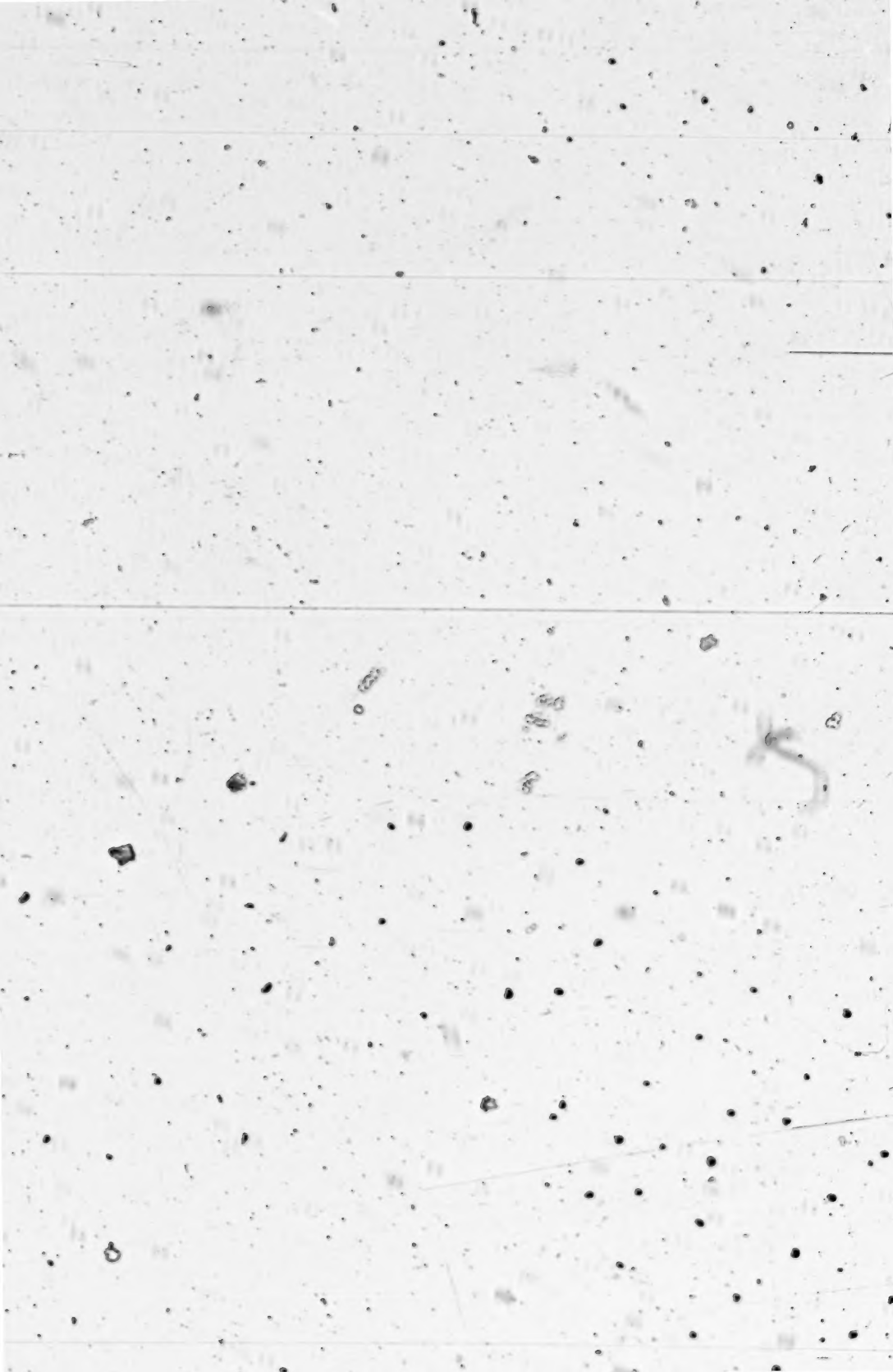
Respectfully submitted,

DAVID REIN
711 14th St., N.W.
Washington, D. C.
Attorney for Petitioners

---

[17] Although the issue on the merits as to whether petitioners are required to register is not before the Court, it is pertinent to note that the legislative history of the Foreign Agents Registration Act establishes that Congress was concerned with registration by foreign agents in the area of propaganda or public relations and not where the representation of the foreign principal is limited to its mercantile and financial interests. See *Viereck* v. *United States*, 318 U.S. 236, 241-247 where this Court reviewed the legislative history of the Act. See also H. Rep. No. 1381, 75th Cong., 1st Sess. at p. 2; H. Rep. No. 1547, 77th Cong., 1st Sess., at p. 4: "The basic theory of the Act [is to require] complete disclosure by agents of foreign principals subject to registration who are engaged in propaganda and kindred enterprises . . ." so that "the recipients of such propaganda can properly appraise its worth."

APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States, APPELLANT

v.

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 4, 1963

Mr. George B. Searls, Attorney, Department of Justice, for appellant.

Mr. David Rein for appellees.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

WRIGHT, *Circuit Judge:* The Foreign Agents Registration Act[1] provides criminal penalties[2] against anyone who represents a foreign government in this country and fails to register with the Attorney General. Certain exceptions are provided.[3] Appellees are attorneys at law representing the Republic of Cuba who have been requested by the Attorney General to register pursuant to the Act. Instead of registering, appellees filed this declaratory judgment action, alleging that since their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," they are exempt from registering under Section 3(d)[4] of

[1] 52 Stat. 631, as amended, 22 U.S.C. §§ 611 *et seq.*

[2] 52 Stat. 633, as amended, 56 Stat. 257, 22 U.S.C. § 618.

[3] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613.

[4] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613(d).

the Act. They pray for a judgment so declaring. In effect, therefore, this proceeding is an effort to restrain the Attorney General from prosecuting appellees under the Act. The District Court denied appellant's motion for judgment on the pleadings and certified this action for appeal.[5]

The threshold question is presented by the venerable, but creaking, doctrine of sovereign immunity. There is no suggestion that the United States has consented to this suit or that the Attorney General is being sued as an individual. Indeed, the named defendant is "The Attorney General of the United States," the name of the current office holder not being included.[6] Consequently, the action, if maintainable at all, must fit the fiction created by *Ex parte Young*, 209 U.S. 123 (1908). There it was held that where an officer acts unconstitutionally, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. Since in such circumstances the officer is theoretically being sued as an individual, the doctrine of sovereign immunity provides no bar. Thus a fiction is indulged to circumvent sovereign immunity.

Ex parte Young, supra, has spawned a welter of cases, all seeking to get under its umbrella.[7] The confusion which ensued has been to some extent relieved by the holding in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), reiterated in *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), that an officer of the United States may indeed be sued in his individual capacity where the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U.S. at 702 and 369 U.S. at 647.

---

[5] 28 U.S.C. § 1292(b).

[6] The Attorney General's name first appeared on the appeal papers in this court.

[7] See 3 Davis, Administrative Law, ch. 27 (1958).

It is not alleged in the complaint that prosecution of the appellees under the Act would be unconstitutional[8] or outside the Attorney General's statutory powers.[9] Appellees' primary argument on the unconsented suit point seems to be that "the doctrine that a suit against a government officer in his official capacity may be a suit against the United States applies only in the situation where the suit is either for government funds or for specific property in the pos-

[8] In arguing that this is an appropriate case for declaratory judgment, appellees assert that the penalties are so severe that they dare not await prosecution. Therefore, they assert, a civil forum must be available or the Act can never be tested. A civil forum may be available under these circumstances, for this argument may raise a constitutional question. *Yakus* v. *United States*, 321 U.S. 414, 438 (1944); *Ex parte Young*, *supra*, 209 U.S. at 145-148. Appellees, aided by competent counsel, for reasons best known to themselves, have decided not to raise the constitutional issue. Under the circumstances, and for the purposes of this motion, we accept appellees' pleadings as presented.

[9] Appellees do argue in their brief that their activities "are expressly exempted from the Act by the terms of the Act itself" and that to this extent appellant's demand that they register is "in excess of his statutory authority." The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, appellees' claim is that appellant has erred, or will err, in construing the law. But the relief for which appellees here pray "can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 690. See also *United States* v. *Thompson*, 251 U.S. 407, 413 (1920); *Goldberg* v. *Hoffman*, 7 Cir., 225 F. 2d 463 (1955); *Fay* v. *Miller*, 87 U.S. App. D.C. 168, 171, 183 F. 2d 986, 989 (1950); *United States* v. *One 1940 Oldsmobile Sedan Automobile*, 7 Cir., 167 F. 2d 404 (1948); *District of Columbia* v. *Buckley*, 75 U.S. App. D.C. 301, 304, 128 F. 2d 17, 20 (1942), *cert.* denied, 317 U.S. 658 (1942); *United States* v. *Segelman*, W.D. Pa., 86 F. Supp. 114 (1949); *United States* v. *Brokaw*, S.D. Ill., 60 F. Supp. 100 (1945).

session of the government." We are not aware that the doctrine of sovereign immunity is so circumscribed. If "the 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would • • • interfere with the public administration," the suit is one against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), citing *Ex Parte State of New York, No. 1*, 256 U.S. 490, 500, 502 (1921).[10] Obviously, restraining the Attorney General from enforcing the criminal laws of the United States would "interfere with the public administration."

Appellees rely heavily on Professor Borchard in arguing that civil procedure should be substituted for criminal procedure in the area not involving moral turpitude, particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." Borchard, Declaratory Judgments (2d Ed. 1941), p. 1021. They also assert with Professor Borchard "that one of the main and most beneficial functions of declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices." Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned. Consequently, since appellees have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States.

So ordered.

---

[10] See also *Larson* v. *Domestic & Foreign Corp.* *supra*, Note 9, at 688; *Stanley* v. *Schwalby*, 147 U.S. 508 (1893); *Reisman* v. *Caplin*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 16,690, decided 2/7/63), p. 4, slip opinion.

FAHY, *Circuit Judge, dissenting:* The suit does not seem to me to be one to enjoin a criminal prosecution, which equity ordinarily will not entertain. The Foreign Agents Registration Act is not such a criminal statute as is involved in cases which illustrate the equitable doctrine. It is primarily a regulatory statute, with a penalty of not more than $10,000 fine, or imprisonment for not more than five years, or both, for willful violation of any of its provisions. Section 618(a). It is not a crime to be a foreign agent, but to act as one unless a specified registration statement is filed, or unless one "is exempt from registration under the provisions of this subchapter." Section 612(a). Appellees allege that they are within the statutory exemption of "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal. . . ." Section 613(d). They allege that they are lawyers and that their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, and that they have not advised, represented, or acted on behalf of Cuba in any such matters. The answer of appellant alleges that he does not have sufficient information to form a belief as to the truth of these allegations respecting matters other than legal. Appellant denies, however, that appellees come within the exemption and has insisted that they file the registration statement. In this situation the District Court, I think properly, denied appellant's motion for judgment on the pleadings.

Since the Attorney General is responsible for administering and enforcing the statute, appellees were under the necessity either of filing the detailed information required by registration statement and acquiescing in the status attributed to them by appellant, or of being criminally

prosecuted and risking the statutory penalties, unless they could secure a declaratory judgment as to their status. There is more in this situation than the impact upon appellees of the mere existence of the statute, and more too than a mere difference of opinion. There is a demand and insistence by appellant that they file the registraiton statement. A case or controversy—a justiciable issue—thus arose. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

The suit is not accurately described as one to enjoin a criminal prosecution. It is to determine the existence of an obligation on appellees' part affirmatively to register in circumstances which create a justiciable issue in that regard. No administrative remedy is provided and there is no remedy at law comparable in adequacy to that available through the Declaratory Judgment Act. See *Greene* v. *McElroy*, 360 U.S. 474 (1959). The Act combines with equity to afford a remedy, for equity is served by not forcing registration in the face of well-founded doubt of the need to do so, until that doubt is resolved—a doubt which we must assume in the present posture of the case is held in good faith. See *Terrace* v. *Thompson*, 263 U.S. 197 (1923). The thrust of the suit is presently too far removed from an effort to enjoin a criminal prosecution to come within the principle adverted to under which equity sometimes denies itself jurisdiction. This principle long antedated the Declaratory Judgment Act and when now invoked should be considered in conjunction with that Act.[1]

---

[1] Appellant cites *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), and *Watson* v. *Buck*, 313 U.S. 387 (1941), both of which, however, involved efforts to have a federal court enjoin state action, which turn upon different considerations. Nor are *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), also cited, controlling because no real controversies were presented for declaratory judgment in those cases (except of course as to the federal employee in *Mitchell* who alleged that he had been engaging in political activity said to be covered by the Act.)

Nor, as it seems to me, is the suit one against the United States within the sovereign immunity doctrine which protects the Government, without its consent, from judicial interference in the disposition of its property or in its appropriate functioning. *Reisman* v. *Caplin*, —— U.S. App. D.C. ——, —— F.2d —— (1963). The American approach to this doctrine has not precluded suits against officials acting in excess of constitutional or statutory authority. See, *e.g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Appellees do not claim, however, that the statute is unconstitutional, so the question narrows to whether the effort of the appellant to require appellees to register is within his statutory authority as that concept has been used in defining the sovereign's immunity. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Attorney General has general authority and responsibility for administering this statute as well as for enforcing federal law generally. But there is a question—a judicial question—on the pleadings in this case as to his authority to require appellees to register. True it is that his insistence that they do so is within his authority in the sense that he is entitled to make a decision bearing upon his administration of the statute, as officials generally are entitled to do in corrying out their responsibilities; but even though such a decision becomes a first step in setting in motion the processes of government, when it gives rise to a controversy such as we have here the basis for the immunity disappears.[2] For in such circumstances a suit against an officer of the United States neither affects the disposition of property as in *Larson* nor, as in *Reisman*, interferes in an unwarranted manner with the functioning of government (the "public administration" of *Land* v. *Dollar*, 330 U.S. 731 (1947)).

[2] The existence of a justiciable controversy does not fall away because the decision has not been pursued further during the pendency of this litigation.

Unlike the situations in either *Larson* or *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), this suit does not require the appellant to do or not to do anything. In *Larson* an injunction was sought prohibiting the Administrator of the War Assets Administration from selling certain property to anyone but plaintiff, who claimed to have a valid contract to buy it from the Administrator. The Court referred to "no allegation of any statutory limitation" on the Administrator's powers as a sales agent. In *Malone* the action sought to eject a Government officer from land which he occupied under claim of title from the United States. Referring to *Larson* the Court pointed out that there "the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers." In our case appellees rely upon a congressionally built-in exemption which is a limitation upon the statutory authority of appellant.

The suit is designed to ascertain what the statute contemplates. If appellees are held to come within the exemption the law is vindicated. If they are found not to come within the exemption appellant remains free to proceed as he deems advisable. In neither case does the suit seek to require appellant to act affirmatively, to surrender property, or even to stay his hand except as understandable self-restraint leads him to do so at present. The Government does not contend that declaratory judgments may never be entered against officers of the United States or that an express consent to be sued is always necessary. See *Greene* v. *McElroy, supra,* where there was no discussion of the immunity doctrine; *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* where the Court sustained jurisdiction and negated the possibility of immunity; and *United Public Workers* v. *Mitchell, supra.*[3]

---

[3] The Supreme Court has said: "Courts of Justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rigths in controversy between them and the government. . . ." *United States* v. *Lee,* 106 U.S. 196, 220 (1882).

The exemption provision is contained in the statute itself and must be construed howsoever the status of appellees is determined. For this purpose the Declaratory Judgment Act is peculiarly appropriate. Of course that Act is not a waiver of sovereign immunity, but it is a means of determining the issue upon the resolution of which the application of the immunity turns.

The lines of the immunity doctrine are elusive. As this court suggested in *Reisman*, policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanctions when the dispute arises out of a regulatory statute like the one before us.[4] As indicated above the dispute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment. I would therefore affirm.

---

[4] A leading authority has indicated that courts have been too uncritical and unanalytical in their application of the doctrine, with its exceptions created in *Ex parte Young*, 209 U.S. 123 (1908). See 3 *Davis, Administrative Law*, pp. 545-576 (1958).

In his dissenting opinion in *Larson*; Mr. Justice Frankfurter took occasion to say: "'Sovereign Immunity' carries an august sound. But very recently we recognized that the doctrine is in 'disfavor'. [Citing *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940)]. It ought not to be extended . . . ." 337 U.S. at 723.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,105

Civil 3729-61

ROBERT F. KENNEDY, Attorney General of the United States, APPELLANT

v.

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order ..... of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to dismiss the case on the pleadings as an unconsented suit against the United States.

Per Circuit Judge Wright.

Dated: April 4, 1963.

Separate dissenting opinion by Circuit Judge Fahy.

INDEX

CITATIONS

Cases:

Statutes: Page

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-9a) is reported at 318 F.2d 181.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1963 (Pet. 10a), and a timely petition

for rehearing was denied on May 1, 1963 (R. 47).[1] The petition for a writ of certiorari was filed on July 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an action against the Attorney General for a declaratory judgment that petitioners, a firm of lawyers representing the Cuban government, are not subject to the registration requirements of the Foreign Agents Registration Act, was properly dismissed as an unconsented suit against the United States.

2. Whether the dismissal may be upheld on the alternative ground that it constitutes an impermissible attempt to enjoin a criminal prosecution.

STATUTES INVOLVED

The pertinent provisions of the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.*, as amended, and the Declaratory Judgment Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, appear in the petition at pages 2-4.

STATEMENT

Petitioners, a firm of lawyers, instituted this action in the United States District Court for the District of Columbia against the Attorney General for a declaratory judgment that their "activities as legal

[1] "R." refers to the joint appendix in the court of appeals, which has been filed with this Court.

representatives for the Republic of Cuba" do not require them to register under the Foreign Agents Registration Act (R. 7). Section 2 of that Act (22 U.S.C. 612) prohibits any person from acting as agent of any foreign government or foreign political party, unless he has registered with the Attorney General; Section 3(d) (22 U.S.C. 613(d)) provides an exception from the registration requirements for any person engaged "only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * * "; and Section 8 (22 U.S.C. 618) provides criminal penalties for willful violations.

Petitioners' complaint (R. 4-7) alleged that in September 1960 the Cuban Government retained them to represent it and its agencies in legal matters, including litigation, involving that Government's mercantile and personal interests, but not involving public relations, propaganda, lobbying, or political or other non-legal activities (R. 4-5); that their activities are covered by the "trade or commerce" exception in Section 3(d) (R. 6); that the Attorney General "demanded [and has continued to demand] that the plaintiffs individually and as a law firm" register under the Act (R. 5); that registration would require public disclosure by themselves, their employees, and associate counsel they might retain in connection with litigation not only of their relations with the Cuban Government but also of numerous private, personal and business affairs unconnected with such representation (R. 5-6); and that such disclosure could result in a serious invasion of their privacy and hamper

them in employing other lawyers (R. 6). The complaint stated (R. 6) that petitioners have no administrative remedy and no adequate remedy at law; that "they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register"; and that "[i]ndictment and prosecution, even without more, will seriously damage [petitioners'] reputation and interfere with their practice of law and their ability to employ and retain associate counsel."

The Attorney General's answer admitted that he had demanded that petitioners register, but denied (1) that registration would require petitioners, their employees or associate counsel publicly to disclose personal and private affairs unconnected with their representation of the Republic of Cuba, and (2) that Section 3(d) excepts petitioners from registration (R. 22-23). He stated that he did not have sufficient information to form a belief as to the truth of the other allegations in the complaint (R. 23). He admitted that the Act does not provide an administrative remedy, but stated that there is an adequate remedy at law (*ibid.*).

The Attorney General then moved for judgment on the pleadings (R. 24). The district court denied the motion, but the court of appeals, in an appeal under the Interlocutory Appeals Act, reversed. In an opinion by Judge Wright (Judge Fahy dissenting), the court held that the suit was "[i]n effect * * * an effort to restrain the Attorney General from prose-

cuting [petitioners] under the Act"; and that "since [petitioners] have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States" (Pet. 2a, 4a).

ARGUMENT

1. An action brought against a government official with respect to the performance of his official duties is an action against the sovereign—and thus not maintainable unless the government has consented to such suit—if "the judgment sought would * * * interfere with the public administration" (*Land* v. *Dollar*, 330 U.S. 731, 738) or if its effect would be "to restrain the Government from acting * * *" (*Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704). *Dugan* v. *Rank*, 372 U.S. 609, 620. If the petitioners ultimately were to prevail in this action—*i.e.*, if it were held that they are not required to register under the Foreign Agents Registration Act—such a ruling would bar their future prosecution for non-registration. The present action for a declaratory judgment therefore is, as the court of appeals stated (Pet. 2a), "[i]n effect * * * an effort to restrain the Attorney General from prosecuting [petitioners] under the Act." As such, it was properly dismissed as an unconsented suit against the United States.

Where a suit against an officer seeks "not * * * damages but * * * specific relief: *i.e.*, * * * injunction * * * restraining the defendant officer's actions.

* * * the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained." *Larson*, *supra*, 337 U.S. at 688. The Foreign Agents Registration Act is enforceable solely by criminal proceedings. The plain purpose of the present suit is, and its obvious effect if successful would be, to prevent the Attorney General from instituting criminal proceedings under the Act against petitioners. Such an attempt to control the law-enforcement activities of the Attorney General is nothing more or less than an attempt to restrain the sovereign from acting in one of the most vital areas of governmental responsibility—the enforcement of its criminal laws.

The rule that a suit against a government official which seeks "relief against the sovereign" (*Larson*, *supra*, pp. 687, 689) is a suit against the sovereign is not limited, as petitioners suggest (Pet. 13), to cases which involve property in the hands of a government official. The controlling consideration is not the subject matter of the suit, but the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign, suits against government officials have frequently been held to be suits against the United States, even though property was not involved.[2]

---

[2] See, for example, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524

Nor is the governing principle any different because the present case is an action for declaratory relief rather than a direct attempt to enjoin the Attorney General from enforcing the Act against petitioners. The Federal Declaratory Judgment Act merely provided a new remedy, but did not expand the jurisdiction of the district courts,[3] and the doctrine of sovereign immunity is fully applicable to suits under it. Cf. *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.

The present case does not come within either of the two recognized exceptions to the doctrine of sovereign immunity, *i.e.*, a suit against an officer is not one against the sovereign if the officer's action is "[1] not within the officer's statutory powers, or * * * [2] their exercise in the particular case, are constitutionally void." *Larson*, *supra*, 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Dugan* v. *Rank*, 372 U.S. 609, 621-622. Petitioners make no claim that either the Foreign Agents Registration Act or its application to them is unconstitutional. They do contend

---

(C.A. 5) (official action of Regional Director of Wage-Hour Division); *Codray* v. *Brownell*, 207 F. 2d 610, 615 (C.A. D.C.), certiorari denied, 347 U.S. 903 (suit to "unblock" property "frozen" under the trading with the Enemy Act); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10).

[3] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; *Alabama Federation* v. *McAdory*, 325 U.S. 450, 461-462; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 325.

(Pet. 18) that Section 3(d) of the Act excepts their activities from the registration requirements, and that the Attorney General's "demand that they register exceeded his statutory authority." While this argument is framed in terms of the Attorney General's authority, it is actually only a claim that he erred in concluding, on the facts of this particular case, that the Act applies to petitioners. The Attorney General concededly has the authority to decide whether the statute covers petitioners' activities, and whether to institute a criminal proceeding if petitioners refuse to register. "His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction [of the Act as applying to petitioners] was wrong * * *" (*Larson*, *supra*, 337 U.S. at 703).

2. The judgment of the court of appeals directing dismissal of the complaint is sustainable on the alternative ground, not reached by that court, that equity ordinarily will refuse to enjoin a criminal prosecution. A declaratory judgment is a form of equitable relief,[4] and the court of appeals correctly treated the present suit as "an effort to restrain the Attorney General from prosecuting [petitioners] under the Act" (Pet. 2a). See *supra*, pp. 5-6. "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its

[4] *Eccles* v. *Peoples Bank of Lakewood, Calif.*, 333 U.S. 426, 431; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 240; see also, *Glidden Company* v. *Zdanok*, 370 U.S. 530, 572.

imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

Shields v. *Utah Idaho R. Co.*, 305 U.S. 177, upon which petitioners rely heavily (Pet. 9-10), does not support the jurisdiction of the district court to entertain this action. *Shields* involved a question under the Railway Labor Act, which applies to railroads other than electric interurban ones; the Act directs the Interstate Commerce Commission, upon the request of the Mediation Board, to determine whether a particular line is within the exception. The Commission, upon the request of the Mediation Board, held after hearing that the Utah railroad was not an interurban electric railway. The Mediation Board ordered the railroad to post certain notices required by the Act; failure to do so subjected the carrier to criminal penalties. The railroad then brought an action against the United States Attorney to restrain him from criminally prosecuting it for violation of the Act, contending that it was in fact an interurban railroad. The government did not challenge the propriety of the railroad's invoking equity jurisdiction to restrain the prosecution. 305 U.S. at 183. This Court, holding that the Commission's determination was binding on both the carrier and the Mediation Board (305 U.S. at 182) and noting that it was not otherwise subject to judicial review (*id.* at

183), ruled that the carrier "was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (*id.* at 184).

In the *Shields* case a suit to enjoin the criminal prosecution was maintainable because it was the only means by which the railroad could test the validity of the Commission's determination. The determination was not directly judicially reviewable, and it would have been binding in any criminal action brought against the carrier for non-compliance with the Railway Labor Act. In the present case, however, petitioners may fully litigate the question whether the Foreign Agents Registration Act applies to their activities in any criminal proceeding which may be brought against them if they fail to register. They are, therefore, in no different position than any other person who believes that his conduct is not subject to a particular criminal statute but who runs the risk that, if a court holds otherwise, he may be punished for his violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

GEORGE B. SEARLS,
Attorney.

AUGUST 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 698231 151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

DAVID REIN
711 Fourteenth Street N. W.
Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ and LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General
of the United States

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONERS

DAVID REIN
711 14th Street, N. W.
Washington, D. C.
Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY FOR PETITIONERS

I.

In our petition we argued (p. 13) that a proper analysis of the cases would show that, despite some loose language, the Court has applied the doctrine of sovereign immunity only in situations where the suit against a government official was for specific performance

of a government contract, for government funds or for specific property in the possession of the government. We noted also that our contention was supported by the language of this Court in *Malone* v. *Bowdoin*, 369 U.S. 643, by language in some lower court decisions and by commentators in the field (p. 13, fn. 4). Ignoring the authorities cited, the government, like the court below, blandly asserts (Opp. 6) that the doctrine of a suit against the sovereign is not so limited. It adds: "suits against government officials have frequently been held to be suits against the United States, even though property was not involved." But to support this assertion of "frequent" holdings, the government cites only one case in this Court, *Louisiana* v. *McAdoo*, 234 U.S. 627. Although the Court used sovereign immunity language in its decision in this case, the holding in the case was that Congress had vested the Secretary of the Treasury with the unreviewable discretion to set tariff rates.[1]

More significantly, the government entirely ignores the numerous cases cited in our petition in which both

[1] The other cases cited by the government are all appellate court decisions, and are equally inapposite to prove the government's point. The discussion of sovereign immunity in *Rogers* v. *Skinner*, 201 F. 2d 521, 524 was entirely unnecessary to the decision in the case since the court held that the complaint should be dismissed because the Secretary of Labor was an indispensable party and that the complaint lacked merit in any event. In both *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, and *Harper* v. *Jones*, 195 F. 2d 705, the courts held that the judiciary had no competence to review the discretion of a commanding officer in setting certain establishments "off limits" for military personnel. Their use of sovereign immunity language to reach this correct result was both unnecessary and illustrative of the confusion surrounding this doctrine. *Codray* v. *Brownell*, 207 F. 2d 610, was in fact a suit for funds in the possession of the government. Moreover, the court held that the claim was without merit.

this Court and the court below assumed jurisdiction under circumstances which cannot possibly be squared with the sovereign immunity formula as stated by the government.[2] According to the government (Opp. 7-8), a suit may be brought against a government official only where it is claimed that he is acting beyond his statutory authority, but not where the claim is made that the official made a legal error.[3] But the cases in which this Court has assumed jurisdiction simply do not fit within this mold. Thus in *Perkins* v. *Elg*, 307 U.S. 325, there was no question that the Secretary of State had the statutory authority and duty to deny passports to non-citizens. He also had the statutory responsibility to determine whether a particular applicant was or was not a citizen. The only issue in the case was whether or not he had wrongly decided that a particular individual was not a citizen. Nonetheless, this Court took jurisdiction of the case and held that the Secretary had wrongly decided the question. In the employee discharge cases such as *Service* v. *Dulles*, 354 U.S. 363, and *Vitarelli* v. *Seaton*, 359 U.S. 535, there was no question that the head of the department involved had the statutory authority to discharge the employee. The sole question was whether he had complied with the appropriate regulations in doing so (in both cases the regulations involved were those issued by the department head himself). Here too the Court took jurisdiction without even considering the question of sovereign immunity. Similarly in *Shields* v. *Utah*

[2] Although we made no effort to be exhaustive, we cited fifteen such cases in this Court, and nine in the court below. (See citations pp. 11-12 and fn. 10 on p. 16).

[3] As we showed in our petition (pp. 17-19), even under this formulation, petitioners' complaint stated a claim for relief and was not barred by the sovereign immunity doctrine.

Idaho Central R. Co., 305 U.S. 177, the Interstate Commerce Commission clearly had the authority to determine whether the plaintiff railroad was or was not an electric interurban railroad. The only issue was whether the Commission had properly exercised its authority on the facts. Here too the Court took jurisdiction and found that the Commission was not only acting within its authority but had reached the correct conclusion on the facts. Yet under the formula advanced by the opposition and the court below, the case should have been dismissed for lack of jurisdiction.

Obviously, if the statement of law as set forth in the government's opposition is correct, then the Court did not have jurisdiction in any of these cases nor in the numerous other cases cited in our petition and which are completely ignored by the opposition. By ignoring the cases, the opposition proves only that its view of the law and the decided cases simply do not jibe. We submit that it would have been more honest for the government to have stated candidly as it did in its opposition in *Reisman* v. *Caplin*, No. 1084, Oct. Term, 1962, No. 119, this Term, that the holding of the court below that the action was barred by sovereign immunity "admittedly raises questions of some difficulty."

II.

The government suggests (pp. 8-10) that the judgment of the Court of Appeals is sustainable on the alternative ground that the present suit lacked equity since "equity ordinarily will refuse to enjoin a criminal prosecution." As the opposition notes (p. 8), the majority of the court below never considered the equities in the case. As it failed to note, the dissenting

opinion of Judge Fahy did consider this question and it demonstrated quite clearly that the present suit falls within normal equity doctrine.

The opposition is incorrect in stating (p. 9) that the *Shields* case held that it was proper to entertain an equitable action to enjoin a criminal prosecution because the determination of the Interstate Commerce Commission "was not otherwise subject to judicial review." The Court did not say that the Commission's determination could not be reviewed in a criminal prosecution. It said only that it was appropriate to review the determination in an equity action to enjoin the prosecution.[4] Under the authority of the *Shields* case, it is entirely appropriate to review in the present action the determination by the Attorney General that petitioners are required to register under the Foreign Agents Registration Act.

Nor does the present case involve a review of the Attorney General's judgment "on the facts of this particular case" (Opp. 8). The complaint alleges that petitioners represent the Republic of Cuba only in mercantile and financial matters and hence are exempt from registration under the express provisions of the Act (R. 4-7). The answer does not dispute this, stating only that the Attorney General has no knowledge whether petitioners' representation goes beyond the foreign principal's mercantile and financial interests (R. 23). He contends, nevertheless, that even if the representation is so limited, petitioners are required to register. Accordingly, the issue presented on the merits is a simple question of law, i.e., whether attorneys representing a foreign government solely in

[4] See quotation in our petition at p. 9.

mercantile and financial matters are required to register under the Foreign Agents Registration Act.

There is no issue here of evasion or attempted secrecy. Petitioners do not deny that they represent the foreign principal; on the contrary, the complaint pleads that they represent the Republic of Cuba, and the appropriate governmental authorities have been so notified.[5] The issue is to be tried and decided in the same court that would determine any eventual criminal prosecution. There are no equitable or practical considerations that suggest that the issue could be better or more expeditiously or more fairly tried as a criminal matter rather than as a civil one. On the other hand, there is every equitable reason why petitioners should have their rights determined without being subjected to the hazards and hardships of a criminal prosecution.

Respectfully submitted,

DAVID REIN
711 Fourteenth Street N. W.
Attorney for Petitioners

[5] The Court will note that petitioners appear as counsel for the Republic of Cuba in a case pending in this Court, *Banco Nacional de Cuba* v. *Sabbatino et al*, No. 16, this Term.

INDEX

CASES CITED

STATUTES, RULES AND LEGISLATIVE MATERIALS

TREATISES AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ and LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General
of the United States

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The District Court issued no opinion. The opinion of the Court of Appeals is reported at 318 F. 2d 181, and is reproduced in the record at pp. 26-34.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1963 (R. 34). A timely petition for rehearing was denied on May 1, 1963 (R. 35-36). The petition for certiorari was filed on July 19, 1963 and was granted on October 14, 1963 (R. 36). The jurisdiction of the Court rests on 28 U. S. Code, Sec. 1254(1).

STATUTES INVOLVED

Foreign Agents Registration Act (Act of June 8, 1938; 52 Stat. 634; 22 U.S.C. 611 et seq., as amended: Section 611(a)):

As used in and for the purpose of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

* * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

(2) any person who within the United States collects information for or reports information to a foreign principal; who within the United States solicits or accepts compensation, contributions, or loans, directly or indirectly from a foreign principal; who within the United States solicits, disburses, dispenses, or collects compensation, contributions, loans, money, or anything of value, directly or indirectly, for a foreign principal; who within the United States acts at the order, request, or under the direction of a foreign principal;

* * * * *

Section 612

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this section 2(a) and section 2(b) hereof or unless he is exempt from registration under the provisions of this subchapter.

Section 613

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals;

* * * * *

(d) Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * *.

* * * * *

Section 618

(a) Any person who—

(1) Willfully violates any provision of this subchapter or any regulation thereunder,

* * * * *

(2) . . . shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Declaratory Judgment Act (62 Stat. 964 as amended; 28 U.S.C. 2201):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seek-

ing such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

QUESTIONS PRESENTED

1. Whether the petitioners, a law firm which represents a foreign government in purely mercantile and financial matters, and accordingly, are not required to register under the Foreign Agents Registration Act, may bring a declaratory action to challenge the Attorney General's demand that they register under that Act; or whether they are relegated to the alternatives of complying with the unlawful demand or submitting themselves to the hazards of an indictment and prosecution for failing to register.

2. Whether such a declaratory judgment action is a suit against the United States.

STATEMENT OF THE CASE

The petitioners are members of the bar of the State of New York, engaged in the general practice of law under the firm name of Rabinowitz & Boudin. According to the allegations in the complaint petitioners were retained on or about September 10, 1960 by the Republic of Cuba to represent that government in purely mercantile and financial matters; ther retainer does not cover advice and representation involving public relations, propaganda, lobbying or political or other non-legal matters and the petitioners have not in fact represented the Republic of Cuba in any respect other than in mercantile and financial matters (R. 3-4).

In August of 1961, the respondent, the Attorney General, demanded that petitioners register with him

in accordance with the provisions of the Foreign Agents Registration Act of 1938, as amended, herein called the Act. The petitioners maintained that their representation of the Republic of Cuba did not fall within the purview of the Act and so informed respondent. The respondent, nevertheless, insisted and continues to insist on his demand that petitioners register (R. 4).

Thereafter, the petitioners filed in the District Court below a complaint for a declaratory judgment declaring that their activities as representatives of the Republic of Cuba do not subject them to the requirements of registration under the Act (R. 3-5). The complaint alleged (R. 5) that these activities do not fall within the purview of the Act and are specifically exempted from the registration requirement of the Act by section 3(d) thereof, 22 U.S.C. § 613(d).

Attached to the complaint as Exhibit A (R. 7-15) is the registration form adopted by the Attorney General and which petitioners would be required to complete in order to fulfill the registration requirements of the Act. This form would require petitioners to disclose all of their businesses, occupations and public activities without regard to any relationship of these activities to their representation of the Republic of Cuba. Petitioners would be required to list all of their law clients and any other outside activities which they may have outside their law business and all talks, speeches, radio broadcasts which they may have made or articles or books which they may have written. The form also would require the petitioners to list all of their stockholdings or any other pecuniary interests in any corporation or any business enterprise, again without regard to whether or not these corporations or business enter-

prises had any relation to the representation of the foreign principal.

The complaint further alleged (R. 4-5) that the petitioners found it necessary to retain counsel in other states in connection with litigation in courts throughout the country. Attached to the complaint as Exhibit B was the Attorney General's Form No. FA-4 (R. 16-18) which respondent would require to be filed by all counsel associated with petitioners. This form would require all associate counsel to disclose all visits to or residences in foreign countries within the past 5 years; all clubs, societies, committees or other non-business organizations in the United States or elsewhere, of which they have been members, directors, officers or employees during the past 2 years; a brief description of all other businesses, occupations or business activities in which they are engaged; all speeches, lectures, talks, radio and television broadcasts delivered during the past 3 months and "all newspapers, magazines, articles, books, pamphlets, press releases, radio and television programs and scripts, and other publications distributed by them or by others for them, or in the preparation and distribution of which [they] rendered any services or assistance, during the past 6 months."

The complaint alleged that this registration requirement constituted a serious invasion of petitioners' privacy and that it would interfere with the petitioners' practice of law since other lawyers whom they would wish to employ or retain might refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 5). The complaint concluded that the petitioners were faced with the dilemma of submitting themselves to this unlawful

invasion of their privacy as a result of the unlawful demand of the Attorney General or in the alternative, resisting the demand and facing indictment and prosecution and possibly even conviction, if they were wrong in their judgment as to the law, for refusing to register. The complaint further alleged that indictment and prosecution, even without more, would seriously damage petitioners' reputation and interfere with their practice of law and their ability to employ and retain associate counsel (R. 5).

The Attorney General filed an answer in which he admitted that petitioners had been retained to represent the Republic of Cuba in its mercantile and financial interests, but denied any knowledge as to whether or not the representation went beyond the mercantile and financial interests of the foreign principal (R. 20). The answer further admitted that the Attorney General had demanded that petitioners register under the Foreign Agents Registration Act, that he had rejected petitioners' claim that they do not fall within the purview of the Act, and that he continued to insist that petitioners register. The answer further alleged that the failure of the petitioners to register as demanded subjected them to indictment, prosecution, and the imposition of criminal penalties (R. 20). The answer also specifically put in issue the legal question as to whether or not the activities of petitioners brought them within the purview of the Act (R. 20).

Respondent then moved for judgment on the pleadings, and his motion was denied by the trial court (R. 21-22). Subsequently, on respondent's motion consented to by the petitioners, the trial court amended its order, certifying, in accordance with 28 U.S. Code § 1292(b) that its order 'involves a controlling ques-

tion of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, . . . and that immediate appeal of this order may materially advance the ultimate termination of the litigation." (R. 22-23.) Thereafter the court of appeals below granted respondent's application for permission to appeal from the district court's order (R. 24), and reversed that order, holding that petitioners' action was a suit against the United States, Judge Fahy dissenting (R. 26-34). A timely petition for rehearing en banc (R. 35) was denied (R. 35-36).

SUMMARY OF ARGUMENT

I.

A. The suit was not barred by the sovereign immunity doctrine since it challenged the Attorney General's action as being beyond his statutory powers.

The statement in the majority opinion below that the complaint did not allege that the Attorney General's action was outside his statutory powers was plainly both captious and inconsistent with the Federal Rules of Civil Procedure. The petitioners were entitled to a liberal construction of their pleading and the presumption that the allegations of the complaint were true. Rule 8(f) of the Federal Rules provides that "All pleadings shall be so construed as to do substantial justice." Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, it was unnecessary for petitioners to add to their complaint the legal argument that, since their activities were specifically exempted from the Act, therefore the demand for their registration exceeded the statutory

authority granted by the Act to the Attorney General. In any event the remedy called for was not dismissal of the complaint, but rather the granting of leave to amend.

The court below confused the capacity in which the Attorney General was sued. The Attorney General was sued in his capacity as the official charged with the administration of the Foreign Agents Registration Act. That he is also the chief law enforcement officer of the United States is not material here. Obviously, the result should be no different than would obtain if Congress had entrusted the administration of this particular statute to the Secretary of State rather than to the Attorney General. Nor does the fact that a possible criminal sanction is involved deprive the courts of jurisdiction.

Under the formula adopted by the court below that a government official has the statutory authority to construe his statutory authority erroneously, no action taken by a government official will exceed his statutory powers. In that event, every suit against a government official will be barred by the sovereign immunity doctrine.

B. An analysis of the cases demonstrates that the doctrine of sovereign immunity has been applied only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government. This Court, as a matter of course, has assumed jurisdiction of multifarious suits challenging the validity of actions by government officials where no issue of government funds or property was raised. Nothing in the decisions of this Court justifies the holding below that, without regard to policy considerations

or the equities involved, the present suit was barred because granting the relief requested would "interfere with the public administration." The proper question is whether "the public administration" is "interfered" with in "an unwarranted manner." Resolution of this question in turn depends on the nature of the injury, the nature of the action challenged and the availability of other relief. On the basis of these considerations, the exercise of jurisdiction was fully justified by the Declaratory Judgment Act and traditional equity principles.

II.

The present action meets all the requirements for a declaratory judgment action. The controversy is definite and concrete, not hypothetical or abstract. It is real and substantial and touches the legal relations of parties having adverse legal interests. It admits of specific relief through a decree of a conclusive character.

The declaratory judgment procedure was created for just such a situation as the present. It was designed to permit a challenge to the validity or applicability of regulatory legislation so as to avoid the dangers and hazards of a criminal prosecution. In addition, the potential penalties faced by petitioners bring this case well within the traditional equity jurisdiction of the courts. There are not present here any of the considerations which normally lead to a court's refusal to entertain jurisdiction in a declaratory judgment action. There is no question here of federal interference with the enforcement of state statutes. This is not a case of an attempt to by-pass an administrative agency or an effort to secure an ad-

visory opinion based upon a hypothetical set of facts, or where the alleged injury is hypotheical and contingent upon speculative future action by an administrative agency. Nor are there any equitable or practical considerations which could justify the denial of declaratory relief.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE ACTION WAS BARRED AS AN UNCONSENTED SUIT AGAINST THE UNITED STATES

A. The Suit Was Not Barred by the Sovereign Immunity Doctrine Since It Challenged the Attorney General's Action as Being Beyond His Statutory Powers

We argue below that the doctrine of sovereign immunity barring suits against government officials does not in any event apply to a suit of the present character. However, assuming the applicability of the doctrine, the present action fits in one of the recognized exceptions. In *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, this Court held that even where the sovereign immunity doctrine is applicable it will not bar a suit which challenges the government official's action as being beyond his statutory powers, although it will bar a suit when the action taken is within the official's powers even if the action involved an error of law.[1]

---

[1] For criticisms of this test as unrealistic and almost impossible to apply in practice, see Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review; Sovereign Immunity; Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479 at 1485-8 (1962); Gellhorn and Byse, *Administrative Law Cases and Comments*, 354-55 (4th Ed. 1960); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1, 12-13 (1960); Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 433-437 (1958); Kramer, *The Place And Function of Judicial Review in*

The present action was brought against the Attorney General in his capacity as the government official charged with the administration of the Foreign Agents Registration Act. Petitioners alleged that since the Act specifically exempted their activities from its coverage, the respondent's demand that they register exceeded his statutory authority. Despite this clear allegation in the complaint, the majority below held that the action was barred because of sovereign immunity. Since its entire discussion of the point is buried in an obscurely worded footnote (R. 28, fn. 9), it is difficult to determine whether the majority decision rested solely on a pleading point, or whether it considered that, however well pleaded, the action would be barred as an unconsented suit against the United States. Either ground for the decision is clearly erroneous.

(1) The statement in the majority opinion that the complaint did not allege that the Attorney General's

---

the Administrative Process, 28 Fordham L. Rev. 1, 15-17 (1959); Davis, *Suing the Government by Suing an Officer*, 29 U. of Chi. L. Rev. 435 (1962); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L. Q. 3 (1954). This Court also has consistently noted that its own decisions in this field cannot be reconciled. See *Cunningham* v. *Mason & Brunswick R. R. Co.*, 109 U.S. 446, 451; *Brooks* v. *Dewar*, 313 U.S. 354, 359-60; *Land* v. *Dollar*, 330 U.S. 731, 738; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 698. The most recent comment on this point was in the dissenting opinion in *Malone* v. *Bowdoin*, 369 U.S. 643 at 650:

> "The Court is quite correct in saying that all of our decisions in this field cannot easily be reconciled; and the same will doubtless be true if said by those who sit here several decades hence."

For a discussion of the cases and their inconsistencies see 3 Davis, *Administrative Law Treatise*, Ch. 27, pp. 545-616.

action was outside his statutory powers was plainly both captious and inconsistent with the Federal Rules of Civil Procedure. Since the case was before the court on respondent's motion for judgment on the pleadings, the petitioners were entitled to a liberal construction of their pleading and the presumption that the allegations of the complaint were true, *Ickes* v. *Fox*, 300 U.S. 82; *Clark* v. *Uebersee Finanz-Korp*, 332 U.S. 480. Rule 8(f) of the Federal Rules provides that "All pleadings shall be so construed as to do substantial justice." See *Maty* v. *Grasselli Chemical Co.*, 303 U.S. 197, 200. As this Court stated in *Conley* v. *Gibson*, 355 U.S. 41, 48: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[2]

Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, it was unnecessary for petitioners to add to their complaint the legal argument that, since their activities were specifically exempted from the Act, therefore the demand for their registration exceeded the statutory authority granted by the Act to the Attorney General.[3] Even if petitioners' legal theory had

---

[2] See also 3 Moore's Federal Practice (2d ed.) 804:

"[P]leadings are not an end in themselves, but are only a means to the proper presentation of a case;—at all times they are to assist, not deter, the disposition of litigation on the merits."

[3] See *Siegelman* v. *Cunard White Star*, 221 F. 2d 189, 196:

"Under Rule 8, a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. It is not necessary to set out the legal theory on which the claim is based." (per Judge, now Justice, Harlan).

been erroneous, under the Federal Rules, they are not "stuck" with the erroneous theory but are entitled to whatever relief may be justified on the basis of the factual allegations in the complaint, 2 Moore's Federal Practice (2d ed.) 1713-5.

Finally, even if it be held that the validity of the complaint required the precise statement of the magic formula that respondent's action was "in excess of his statutory authority," obviously the remedy called for was not dismissal of the complaint, but rather the granting of leave to amend.[4] The court below was aware that petitioners were challenging the respondent's statutory authority to act as he did (R. 28, fn. 9) and should have decided the case on that basis, since a trial court's denial of leave to amend to include such an allegation would have constituted reversible error. *United States* v. *Hougham*, 364 U.S. 310; *Dowdy* v. *Procter & Gamble Mfg. Co.*, 267 F. 2d 827.

(2) The court below was also apparently of the view that even if the complaint had properly pleaded an excess of respondent's statutory authority, it would nevertheless have been insufficient. It reasoned as follows (R. 28, fn. 9):

> "The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, [petitioners'] claim is that [respondent] has erred, or will err when construing the law."

[4] Since the trial court found no defect in the complaint, petitioners had neither the occasion nor the opportunity to apply for leave to amend under Rule 15(a) which provides that "leave shall be freely given when justice so requires."

This reasoning is fallacious on two grounds.

In the first place, the court confused the capacity in which the Attorney General was sued. The Attorney General was sued in his capacity as the official charged with the administration of the Foreign Agents Registration Act. That he is also the chief law enforcement officer of the United States is not material here. Obviously, the result should be no different than would obtain if Congress had entrusted the administration of this particular statute to the Secretary of State rather than to the Attorney General.[5] If, under such circumstances, petitioners would have been entitled to a declaratory judgment against the Secretary of State because of his erroneous and unauthorized interpretation of the statute, cf. *Perkins* v. *Elg*, 307 U.S. 325, petitioners should also be entitled to a declaratory judgment against the Attorney General. The contrary view amounts to an assertion that the Executive can oust the courts of jurisdiction over a controversy simply by transferring the function of administering a statute from one government official to another.

Nor does the fact that a possible criminal sanction is involved deprive the courts of jurisdiction. Thus this Court entertained jurisdiction of an action to restrain the Secretary of War from recommending a criminal prosecution, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, and of an action brought jointly against the Interstate Commerce Commission and the United States Attorney to restrain a criminal prosecution, *Shields* v. *Utah Idaho Cent. R.R. Co.*, 305 U.S. 177. The *Shields*

[5] Congress did originally entrust the administration of the statute to the Secretary of State. The functions of administering the statute were transferred to the Attorney General by Executive Order, see Note prefacing 22 U.S.C. §§ 611 ff.

case involved a challenge to a finding by the Interstate Commerce Commission that a railroad came within the scope of the Railway Labor Act. Under the statutory scheme, the railroad, if subject to the Act, was required to post certain notices, and the failure to do so subjected it to criminal penalties. The Court stated as follows on the subject of jurisdiction (at 183-184):

> "Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of the procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions . . . . [W]e think respondent was entitled to resort to equity in order to obtain a judicial review of the validity and effect of the Commission's determination purporting to fix its status."

Secondly, if the reasoning of the court below is to prevail, no case can ever be brought in which the claim that a government official acted outside his authority can be sustained. Every government official has the authority and responsibility to construe, in the first instance, the statutory powers conferred upon him. And it may be assumed that in all cases where the claim is made that he is exceeding his authority, the official is in good faith contending that he is not, and that the issue is an arguable one which requires judicial resolution. But the formula adopted by the court below that the official has the statutory authority to construe his statutory authority erroneously would in effect preclude all judicial review and oust the

courts of jurisdiction at the threshold.[6] If such is the case, no action taken by a government official will exceed his statutory powers, and hence every suit against a government official will be barred by the sovereign immunity doctrine. Obviously the *Larson* case does not stand for that proposition, especially since as we show more fully below, citizens have been consistently suing government officials in federal courts, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. Rev. 1 (1963).

B. The Doctrine of Sovereign Immunity Does Not Apply to Cases Such as the Present

We have shown that the court has jurisdiction of the action under the *Larson* sovereign immunity formula. But in any event an analysis of the cases in this Court demonstrates that, despite the sweeping language sometimes employed, the doctrine of sovereign immunity has been applied only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government,

---

[6] This view that a good faith construction of his statutory powers exempts a government official from judicial review of the validity of his actions was rejected by this Court as long ago as 1902, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110-11:

> "Although the Postmaster General had jurisdiction over the subject matter . . . and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

Cf. *Wilbur* v. *United States ex rel Krushnic*, 280 U.S. 306; *Harmon* v. *Brucker*, 355 U.S. 579.

see e.g. *Mine Safety Co.* v. *Forrestal,* 326 U.S. 371; *Land* v. *Dollar,* 330 U.S. 731; *Larson* v. *Domestic & Foreign Corporation,* 337 U.S. 682, *Malone* v. *Bowdoin,* 369 U.S. 643, cf. *Ickes* v. *Fox,* 300 U.S. 82. And numerous commentators have made the same observation.[7]

Beginning at least with *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94, it has been accepted virtually without question that the courts have jurisdiction over suits challenging the validity of actions taken by federal government officials where no issue of government funds or property was raised. And in *Stark* v. *Wickard,* 321 U.S. 288, 290, this was referred to as "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy . . . "

Applying that "familiar principle," this Court has, as a matter of course, assumed jurisdiction of multifarious suits challenging the validity of actions by government officials and indistinguishable in principle or theory from the present case. See e.g. actions challenging the validity of a harbor line established by Secretary of War, *Philadelphia Co.* v. *Stimson, supra;* action challenging the application of a test which would exclude the import of tea, *Waite* v. *Macy,* 246 U.S. 606; action challenging the classification of a railroad by the Interstate Commerce Commission, *Shields* v.

---

[7] See, Jaffe, *op cit supra,* at 21, 29; Byse, *op cit supra* at 1485-6, 1528; Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages,* 40 Cornell, L.Q. 3, 19-20 (1954); Carrow, *op cit supra;* Comment, 8 Stanford Law Rev. 683, 684-6 (1956); *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Actions* (Note), 2 U.C.L.A. Law Rev. 382, 383 (1955). See also *Farrell* v. *Moomau,* 85 F. Supp. 125.

Utah Idaho R.R. Co., 305 U.S. 177; actions challenging the refusal of the Secretary of State to issue passports, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; suits challenging the validity of the discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 331; *United Public Workers* v. *Mitchell*, 330 U.S. 75; an action challenging the character of an Army discharge, *Harmon* v. *Brucker*, 355 U.S. 579; an action challenging the Civil Service Commission's classification of hearing examiners, *Ramspeck* v. *Fed. Trial Examiners*, 345 U.S. 128; an action challenging the validity of regulations giving veterans priority in retention in the government service, *Hilton* v. *Sullivan*, 334 U.S. 323; an action challenging the lease of public lands, *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621.[8]

It is impossible to fit these cases into the formula distilled by the government and the court below from *Larson*, i.e., that a suit may be brought against a government official only when it is claimed that he is acting

---

[8] The lower court also has, despite its decisions in the instant case, and in *Reisman* v. *Caplin*, 317 F. 2d 123, at the same time assumed jurisdiction in numerous other cases where government officials were defendants. See, e.g., *Deak* v. *Pace*, 185 F. 2d 997; *Born* v. *Allen*, 291 F. 2d 345 (government employee discharges); *Ingalls* v. *Zuckert*, 309 F. 2d 659 (challenge to validity of a resignation from the Air Force); *Morgan* v. *Udall*, 306 F. 2d 799; *Carl* v. *Udall*, 309 F. 2d 653 (challenges to the validity of leases of public lands); *Davis* v. *Board of Parole*, 306 F. 2d 801; *Josey* v. *Board of Parole*, 320 F. 2d 730 (challenging discretionary actions of Board of Parole); *McNamara et al.* v. *Dick et al.*, 323 F. 2d 276 (challenging refusal of Secretary of Defense to transfer Navy employees to other jobs); *Division 1267 etc.* v. *Ordman*, 320 F. 2d 729, (claim of abuse of discretion by General Counsel of the Labor Board).

beyond his statutory authority, but not when the claim is made that the official made a legal error. Thus in *Perkins* v. *Elg*, there was no question that the Secretary of State had the statutory authority and duty to deny passports to non-citizens. He also had the statutory responsibility to determine whether a particular applicant was or was not a citizen. The only issue in the case was whether or not he had wrongly decided that a particular individual was not a citizen. Nonetheless, this Court took jurisdiction of the case and held that the Secretary had wrongly decided the question. In the employee discharge cases such as *Service* v. *Dulles* and *Vitarelli* v. *Seaton, supra*, there was no question that the head of the department involved had the statutory authority to discharge the employees. The sole question was whether he had complied with the appropriate regulations in doing so (in both cases the regulations involved were those issued by the department head himself). Here too the Court took jurisdiction without even considering the question of sovereign immunity. Similarly in *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, the Interstate Commerce Commission clearly had the authority to determine whether the plaintiff railroad was or was not an electric interurban railroad. The only issue was whether the Commission had properly exercised its authority on the facts.

As pointed out by Professor Jaffe,[9] it has not been the practice of this Court to resolve the question of sovereign immunity on the basis of a "grand abstraction" but rather on the basis of history and "our legal tradition. This tradition . . . tell[s] us that the sensi-

[9] Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 21, 28-9, 39 (1963).

tive areas—the areas where consent to suit is likely to be required—are those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property." The *Larson* case is no exception. Despite the language employed in the opinion,[10] the case was in fact an action for specific performance of a contract for the shipment of coal. The narrow issue was whether the plaintiffs could have equitable relief or were relegated to a suit for damages in the Court of Claims.[11] And the subsequent *Malone* opinion, which relied on *Larson*, was careful to note that the area of controversy was "suits against government agents specifically affecting property in which the United States claimed an interest" (at 646).

The issue of sovereign immunity has always been resolved on the basis of important policy considerations, see Douglas, J. dissenting in *Malone* v. *Bowdoin, supra* at 650, 653.[12] Foremost among these considerations is the "current disfavor of the doctrine of governmental immunity from suit," and the general policy to contract rather than expand the doctrine of sovereign immunity, see *Keifer* v. *Reconstruction Finance*

---

[10] The unfortunate consequences resulting from the case of such broad language as in the decision of the court below was predicted. "The use of mechanical and unrealistic language, as in *Larson*, presents the danger that lower courts will rely on words and ignore underlying policies" *Sovereign Immunity and Specific Relief Against Federal Officers* (Note) 55 Colum. L. Rev. 74, 82 (1955).

[11] Only four Justices joined in the principal opinion. Justice Rutledge concurred only in the result, while Justice Douglas wrote a concurring opinion stating he agreed with the Court's opinion as applied to cases involving the sales of government property, see Justice Douglas' dissent in *Malone* v. *Bowdoin, supra* at 649-50.

[12] See also Byse *op cit supra* at 1530, Gellhorn & Byse, *op cit supra* at 354-55, and the dissenting opinion of Judge Fahy below at R. 33.

Corp., 306 U.S. 381, 391; *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245; *National City Bank* v. *Republic of China*, 348 U.S. 356, 359.[13] Nothing in the decisions of this Court justifies the holding below that, without regard to policy considerations or the equities involved, the present suit was barred because granting the relief requested would "interfere with the public administration."[14]

Whenever a suit is brought against a government official, granting the relief requested will "interfere with the public administration." This was certainly true of the numerous cases cited supra pp. 18-19, in which this Court took and exercised jurisdiction. As noted in the dissenting opinion (R. 32), the proper question is whether "the public administration" is "interfered" with in "an unwarranted manner." Res-

[13] For the virtually unanimous view of the commentators that the general and desirable trend is to narrow rather than expand the scope of the doctrine, see e.g. Jaffe, *op cit supra*, Byse, *op cit supra*, 3 Davis, *Administrative Law Treatise*, ch. 27; Gellhorn & Byse, *Administrative Law Cases and Comments*, 354-5 (4th ed. 1960); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L.Q. 3, 25, 35-39 (1954); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476 (1953); Davis, *Suing the Government by Suing An Officer*, 29 U. of Chi. L. Rev. 435 (1962); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 420, 433 (1958); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev. 1, 17 (1959); Comment, 8 Stanford Law Review 683, 692-3 (1956).

[14] Curiously enough this particular phrase was taken from the opinion of Justice Douglas in *Land* v. *Dollar*, at 738, in which the claim of sovereign immunity was rejected. Justice Douglas' subsequent concurring opinion in *Larson* and dissent in *Malone* evidence that he had no intention of giving the language the scope attributed to it by the court below.

olution of this question in turn depends on the nature of the injury, the nature of the action challenged and the availability of other relief. Yet the court below rejected jurisdiction without considering any of these questions. Further, it reached this result despite the fact that this Court has usually taken jurisdiction in cases of this character, see e.g. *Shields* v. *Utah Idaho R.R. Co., Philadelphia Co.* v. *Stimson, Perkins* v. *Elg*, discussed *supra* pp. 15-16,[15] and although there is no precedent for refusing jurisdiction in cases such as the present.[16] Finally, as we show more fully below, the exercise of jurisdiction was fully justified by the Declaratory Judgment Act and traditional equity principles.

II. THE PRESENT CASE IS AN APPROPRIATE CASE FOR DECLARATORY JUDGMENT RELIEF

The present action meets all the requirements for a declaratory judgment action and indeed, as we shall show, the statute providing for declaratory judgment

[15] The court below considered it significant that "the named defendant" [in the complaint] is "The Attorney General of the United States" thus indicating that the suit was brought against the Attorney General in his official capacity (R. 27). But Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that "When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name." See also 28 U.S. Code § 1391(e).

[16] In rejecting our contention that the sovereign immunity doctrine had not previously been applied to a case such as the present the court below stated (R. 28-29): "We are not aware that the doctrine of sovereign immunity is so circumscribed," citing in support of its conclusion four cases in this Court which in fact involved suits either for government funds or for specific property in the possession of the government, viz: *Land* v. *Dollar, supra; Ex Parte State of New York No. 1*, 256 U.S. 490; *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*; and *Stanley* v. *Schwalby*, 147 U.S. 508.

relief was designed to cover just such cases as the present. The requisites for a declaratory judgment action are set out as follows in the leading case of *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241:

> "A 'controversy' . . . must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. . . . And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

The present action meets all of these tests;

a. The controversy is definite and concrete, not hypothetical or abstract. This is not a case where petitioners are seeking a court ruling either on a hypothetical set of facts or an abstract proposition of law. The issue posed by the proceeding is whether petitioners' representation of a foreign principal in purely mercantile and financial matters subjects them to the requirements of the Foreign Agents Registration Act. Respondent's

position in essence is that petitioners must register even though their representation is limited to mercantile and financial matters because their foreign principal is a foreign government.[17] Thus the concrete legal question presented on an actual existing state of facts is whether attorneys who represent a foreign government purely on mercantile and financial matters are required to register under the Foreign Agents Registration Act.[18]

---

[17] As a matter of pleading, respondent's allegation in par. 4 of his answer (R. 20) that he lacks "knowledge [n]or information sufficient to form a belief" as to whether petitioners' representation of the foreign principal is limited to mercantile and financial matters raises an issue of fact to be determined at the trial. The fact that the trial court may be required to resolve disputed issues of fact is no bar to declaratory judgment relief. Anderson, *Declaratory Judgments* (2d ed. 1951) 374, 548. Indeed the existence of a factual dispute which may require resolution at a trial only serves to demonstrate that the case is concrete and definite and not abstract or hypothetical. See e.g. *Metropolitan Casualty Ins. Co.* v. *Richardson*, 81 F. Supp. 310.

It should be noted, however, that respondent's admission that he had no knowledge or information that petitioners' representation of the foreign principal was not limited to financial or mercantile matters shows that his demand that petitioners register was not based on the ground that their representation went beyond that alleged in the complaint.

[18] Although the issue on the merits as to whether petitioners are required to register is not before the Court, it is pertinent to note that the legislative history and the decided cases establish that Congress was concerned with registration by foreign agents in the area of propaganda or public relations and not where the representation of the foreign principal is limited to its mercantile and financial interests. See *Viereck* v. *United States*, 318 U.S. 236, 241-247, where this Court reviewed the legislative history of the Act. See also H. Rep. No. 1381, 75th Cong., 1st Sess., at p. 2; H. Rep. No. 1547, 77th Cong., 1st Sess., at p. 4: "The basic theory of the Act [is to require] complete disclosure by agents of foreign

b. The controversy touches the legal relations of parties having adverse legal interests. On the one side is the petitioners' right of privacy, their right not to make disclosure of their private affairs in response to an unlawful governmental demand, a right which has always received the protection of the courts, *Kilbourn* v. *Thompson*, 103 U.S. 168; *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447; *Jones* v. *S.E.C.*, 298 U.S. 1, *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298.[19] In addition, as alleged in the complaint, the requirement of registration will impair petitioners' ability to retain associate counsel, and this will interfere with their right to practice law, clearly a valuable property right. On the other side, if petitioners are in fact required to register under the Act, the Attorney General as the chief law enforcement officer and the government official charged with the administration of the Act, has a legal interest and indeed a legal duty to require their registration.

---

principals subject to registration who are engaged in propaganda and kindred enterprises" . . . so that "the recipients of such propaganda can properly appraise its worth." See also *United States* v. *Peace Information Center*, 97 F. Supp. 255; *United States* v. *Auhagen*, 39 F. Supp. 590, 591; *United States* v. *Kelly*, 51 F. Supp. 362. The basic contention of the respondent that the test for coverage is different where the foreign principal is a foreign government is not borne out by the language of the statute or by its legislative history. Moreover, the disclosures required by respondent's forms, *supra* pp. 4-6, although relevant to the registration of a propaganda or public relations agent, make no sense when demanded of a law firm whose representation is restricted to mercantile and financial matters.

[19] See also Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

c. The controversy is real and substantial. The respondent has formally demanded that petitioners register. The petitioners have replied that their activities are not subject to the Act, and that they accordingly are not required to register. The respondent considered and rejected petitioners' legal position, and maintains his insistence that they register. This dispute is real, active, substantial and concrete. The opposing views would be presented in the litigation by adverse parties as clearly and as sharply as in any litigation.

d. The controversy admits of specific relief through a decree of a conclusive character. A decree by the District Court, assuming its finality after appeals, that the activities of the petitioners are not subject to the Act would end the dispute with finality. It would be binding upon the Attorney General. He would no longer insist on his demand that the petitioners register and the petitioners could continue their activities without the threat of indictment and prosecution.[20]

On the other hand, if the court issued a final judgment that the petitioners are subject to registration under the Act, this would also dispose of the matter with legal finality. Petitioners would not be permitted to relitigate this matter in any future criminal pros-

[20] Of course, petitioners would get no protection from the decree if they subsequently engaged in a representation of their foreign principal which went beyond its mercantile and financial interests. But that would also be true in the case of a criminal prosecution in which petitioners prevailed. The judgment in such a case would also give the petitioners protection only with respect to the type of activities covered by the case and not with respect to future activities of a different nature.

ecution. As a practical matter, there is no question that the petitioners would comply with the registration requirement since it would be clear that their legal position that they are not subject to the Act was no longer tenable.

The respondent argued below that petitioners are not entitled to declaratory relief because their action is in essence an action to enjoin a criminal prosecution and their complaint does not satisfy the requirements of such an action. This argument is fallacious for two reasons: (1) The declaratory judgment procedure was created for just such a situation as the present, and (2) Even if it were a prerequisite for relief that the case meet the requirements for injunctive relief, the facts set forth in the complaint satisfy those requirements.

(1) In his standard work, *Declaratory Judgments*, (2d ed. 1941), Professor Borchard[21] states that the declaratory judgment procedure was created for just such a situation as the present (at 906). He points out (at 1020) that one of the main and most beneficial functions of the declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices. He further argues (p. 1021) that the civil procedure should be substituted for the criminal in an area not involving moral turpitude or *malum in se* particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." The same approach was set out in the Senate Report accompanying the

[21] Professor Borchard is generally acknowledged as the author of the Declaratory Judgment Act.

bill which later became the Declaratory Judgment Act.[22] Thus the Senate Judiciary Committee said in S. Rep. 1005, 73rd Cong., 2d Sess., pp. 2-3:

> "The [Declaratory Judgment] procedure has been especially useful in avoiding the necessity, now so often present of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin* (284 Ill. 389, 120 N.E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S.W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy."

And page 6 of the Report quoted with approval as underlying the purpose of the Declaratory Judgment Act the language of this Court in *Terrace* v. *Thompson*, 263 U.S. 197, 216:

> "They are not obligated to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."

---

[22] The Report acknowledges the Committee's debt to the work of Prof. Borchard at p. 2. For a contemporary view that the Declaratory Judgment Act was intended to afford relief in cases such as the present, see Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 40, 43, 49-50 (1934).

In an article reviewing the early history of the Declaratory Judgment Act, Prof. Borchard wrote (Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 461 (1943)):

> "Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law, involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right and power, on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment. . . .
>
> "The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible."[23]

(2) Moreover, the potential penalties faced by petitioners bring this case well within the traditional equity jurisdiction which has led the Court to entertain suits

---

[23] For illustrative state cases on the availability of the declaratory judgment procedure to determine the application to a plaintiff of particular regulatory and penal laws see *New York Foreign Trade Operators* v. *State Liquor Authority*, 285 N.Y. 272, 34 N.E. 2d 316; *Herald Publishing Co.* v. *Bill*, 142 Conn. 53, 111 A. 2d 4 and Anderson, *Declaratory Judgments* (2d ed. 1951) sections 644, 727, 728, 734.

for injunction or declaratory judgment, or a combination of those requests for relief, which challenged the validity or application of penal statutes. The threatened prosecution of attorneys-at-law for a felony entails not only a possible fine and imprisonment (the maximum fine and imprisonment under the statute is $10,000 and five years), but also damage to their reputation and impairment of their future ability to practice law. This is a more severe hazard than that involved in many of the cases in which jurisdiction was entertained. See e.g. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (Corporation faced a potential fine of $2500 for building a bulkhead or wharf beyond a line established by Secretary of War. Statute also provided that structure would be removed); *Adams* v. *Tanner*, 244 U.S. 590 (Maximum penalty of $100 fine and 30 days imprisonment for taking a fee for finding employment); *Packard* v. *Banton*, 264 U.S. 140 (Statute made it a misdemeanor to operate passenger cars for hire without having furnished a personal bond or insurance policy in the amount of $2500 to cover liability for personal injury caused by defects in the vehicle. Opinion does not state the penalty imposed for violation).. *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 (Statute imposed criminal penalties on carrier for failing to post certain prescribed notices under the Railway Labor Act. Opinion does not detail the size of the penalties); *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (Maximum penalty of fine of $500 and imprisonment for 90 days for denying a person membership in a labor organization on grounds of race, color, or creed); *Evers* v. *Dwyer*, 358 U.S. 202 (Statute subjected Negro to prosecution for refusal to

sit in back of bus. Opinion does not state the penalty for violation).[24]

This does not mean that the courts will entertain jurisdiction over every action challenging the validity or applicability of a penal statute. Thus, the federal courts will not normally interfere with the enforcement of *state* statutes, particularly when some question is raised as to the proper interpretation of state law, *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450; *Watson* v. *Buck*, 313 U.S. 387; *Douglas* v. *Jeannette*, 319 U.S. 157; *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45; see Davis, *Ripeness for Judicial Review, op. cit.* at pp. 1148-9. Since the present case involves the interpretation of a federal statute, the difficulties posed by the problems of federal-state relations have no bearing here.

And there may be other considerations, equally not applicable here, which would make a particular challenge to a penal statute not ripe for judicial review. There may be no actual controversy between the parties because the challeged statute was held in effect to have been repealed by desuetude as in *Poe* v. *Ullman*, 367 U.S. 497, or where a plaintiff, having failed to obtain an advisory opinion from the Attorney General as to whether a particular transaction violated a

---

[24] For an exhaustive discussion of the cases, see the two-part article by Professor Davis, *Ripeness for Judicial Review*, 68 Harv. L. Rev. 1122, 1326, particularly 1145-1153 (1955). Prof. Davis distilled from the cases the following rule: Except where the case is otherwise not ripe for judicial review (see discussion *infra*), "A statute or a regulation which is enforceable through criminal prosecution should be subject to challenge in a suit for injunction or declaratory judgment brought by a party who is immediately confronted with the problem of complying or violating; risk of criminal penalties should not be exacted as the price of challenge" at 1368.

statute, requested the court to give an advisory opinion, as in *Helco Products* v. *McNutt*, 137 F. 2d 681, or where a plaintiff challenged in the abstract the validity of an administrative agency's general statement of policy, but made no showing that the policy applied to it and presented no concrete set of facts, as was the situation in *John P. Agnew Co.* v. *Hoage*, 99 F. 2d 349. And, of course, the courts will not grant declaratory or injunctive relief, where the alleged injury is hypothetical and contingent upon speculative future action by an administrative agency, as in *Eccles* v. *Peoples Bank*, 333 U.S. 426; or where a plaintiff attempts to bypass an administrative agency which is granted jurisdiction to consider the dispute in the first instance as in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237.

With regard to the applicability of the Declaratory Judgment Act to the present case, the majority below stated (R. 29): "Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned." The opinion, however, does not state where or how Congress has so "decreed." There is in fact, no Congressional action which bars relief for petitioners. On the contrary, the only relevant Congressional expression on the question, the Declaratory Judgment Act, shows that it was Congress' intention that the courts take jurisdiction of cases such as the present.[25]

---

[25] The majority below considered it significant that petitioners' "competent counsel, for reasons best known to themselves have decided not to raise the constitutional issue" resulting from the denial of a civil forum to test the applicability of the Act (R. 28 fn. 8). But counsel contended that a civil forum was available both under the Declaratory Judgment Act and traditional equity principles. Accordingly, petitioners had no cause to complain

Nor are there any equitable or practical considerations which could justify the denial of declaratory relief. There is no issue here of evasion or attempted secrecy. Petitioners do not deny that they represent the foreign principal; on the contrary, their complaint pleads (R. 3-5) that they represent the Republic of Cuba and that the appropriate governmental authorities have been so notified.[26] The issue is to be tried and decided in the same court that would determine any eventual criminal prosecution. There are no equitable or practical considerations that suggest that the issue could be better or more expeditiously or more fairly tried as a criminal matter rather than as a civil one.

CONCLUSION

The Attorney General is not entitled to, nor should he desire petitioners' registration if they are not required to register under the terms of the Act. And if petitioners' activities have been expressly exempted by Congress from the coverage of the Act, it does not "interfere with the public administration" for a court so to declare. On the other hand, there is certainly no equity in the argument that petitioners should be compelled to register, even though the law does not require them to, under the threat of a criminal prosecu-

---

that Congress had unconstitutionally denied them a civil forum, because Congress had not done so. In essence, the court below denied petitioners relief because their "competent counsel" failed to anticipate that the court's ignoring of both the Declaratory Judgment Act and traditional equity principles would pose an otherwise non-existent constitutional issue.

[26] The Court will note that petitioners appear as counsel for the Republic of Cuba in a case pending in this Court, *Banco Nacional de Cuba* v. *Sabbatino et al.*, No. 16, this Term.

tion without being first afforded the opportunity of obtaining a judicial declaration on the validity of respondent's demand that they register.

The judgment below should be reversed, and the case remanded to the District Court to permit the consideration and determination of petitioners' complaint on its merits.

Respectfully submitted,

DAVID REIN
711 14th Street, NW.
Washington, D. C.
Attorney for Petitioners

INDEX

730-775—64——1

CITATIONS

Cases:

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The majority and dissenting opinions in the court of appeals (R. 26–34) are reported at 318 F. 2d 181.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1963 (R. 34–35), and a timely petition for rehearing was denied on May 1, 1963 (R. 35–36). The petition for a writ of certiorari was filed on July 19, 1963, and granted on October 14, 1963 (R. 36; 375 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners, a firm of attorneys representing the Cuban government, brought this action against the Attorney General for a judgment declaring that they are not subject to the registration requirements of the Foreign Agents Registration Act. They allege that their activities come within a statutory exemption for persons engaged only in private and non-political financial or mercantile activities in furtherance of the bona fide trade or commerce of a foreign principal. The questions presented are:

1. Whether petitioners have made the showing required for equitable relief—that a prosecution for non-registration would constitute irreparable harm.

2. Whether petitioners' complaint constitutes a suit against the United States without its consent.

STATUTES AND REGULATIONS INVOLVED

The Declaratory Judgment Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, pertinent portions of Sections 1, 2, 3, and 8 of the Foreign Agents Registration Act of 1938, 52 Stat. 631, as amended, 22 U.S.C. 611, *et seq.*; 28 U.S.C. 507, and portions of the Rules and Regulations governing administration of the latter Act, 28 CFR 5.1 *et seq.*, are set out in the Appendix, *infra*.

STATEMENT

Petitioners, attorneys engaged in the practice of law, instituted this action in the United States District Court for the District of Columbia against the Attorney General for a "judgment declaring that their

activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended" (22 U.S.C. 611 *et seq.*) (R. 3–7). Section 2(a) of the Registration Act provides that "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement * * * or unless he is exempt from registration under the provisions of this [Act]" (App., *infra*). Section 3 of the Act exempts various classes of persons from the registration requirements, including "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *" (App., *infra*).[1] The Attorney General is responsible for prosecuting violations of the Registration Act pursuant to Section 8(a)(1) which makes willful violation punishable, upon conviction, by a fine of not more than $10,000 or by imprisonment for not more than five years, or both (App., *infra*). No other method of enforcement is provided.

Petitioners' complaint (R. 3–18) alleged that in September 1960 the government of the Republic of

[1] Petitioners quote (Br. 3) the statute as it read prior to an amendment in 1961 (Act of October 4, 1961, 75 Stat. 784) which narrowed the terms of the exception. The section previously provided: "Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * *" (22 U.S.C. (1958 ed.) 613(d)).

Cuba retained their firm "to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba" (R. 3–4); and that since that time, petitioners have been acting as the legal representative of the Cuban government (R. 5). Petitioners alleged that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, that they have not advised, represented or acted on behalf of Cuba in any such matters (R. 4), and that accordingly their activities are specifically exempted from the requirements of registration by the "trade or commerce" exemption in Section 3(d) of the Act (R. 5).

Petitioners' complaint asserted further that the Attorney General "demanded [and has continued to demand] that the plaintiffs individually and as a law firm" register under the Act (R. 4); that registration would require public disclosure by themselves, their employees and any associate counsel whom they might retain in connection with litigation, not only of their relations with the Cuban government but also of "numerous private, personal and business affairs unconnected with [such] representation" (R. 4); and that such disclosure will result in a serious invasion of their privacy which will seriously interfere with their practice of law since other lawyers whom they will wish to employ or retain may refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 5). The com-

plaint stated that petitioners have no administrative remedy and no adequate remedy at law; that "they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register"; and that "[i]ndictment and prosecution, even without more, will seriously damage [petitioners'] reputation and interfere with their practice of law and their ability to employ and retain associate counsel" (R. 5).

Petitioners attached to their complaint copies of two printed forms supplied by the Department of Justice for the use of registrants under the Act:[2] Form FA–2 (R. 7–15) to be used by partnerships, corporations, associations and other organizations and groups required to register, and the "short form," FA–4 (R. 16–18), for use by officers, directors, partners, or associates of organizations required to file Form FA–2 as well as by persons who render services or assistance to such organizations for or in the interests of a foreign principal. Form FA–2 advises that all items are to be answered; that where the answer to an item is "none" or "inapplicable" the registrant should so state; and that if compliance with any requirement of the form appears to be inappropriate or unduly burdensome, the registrant may apply for a complete or partial waiver of the requirement. If any of the information called for by the form is not known

[2] Section 5.203 of the Regulations Governing Administration of the Foreign Agents Registration Act of 1938, as amended, provides that every person required to register shall use one of the two forms (28 C.F.R. 5.203).

and cannot be readily ascertained, registrants are advised to indicate this fact and to state briefly the reasons why the information cannot be obtained (R. 7).

The Attorney General's answer (R. 19–21) alleged, *inter alia*, that the court was without jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 19). He admitted petitioners' allegation that he had demanded that they register, but denied that registration would require petitioners, their employees or associate counsel publicly to disclose any of their private, personal and business affairs unconnected with the petitioners' representation of the Republic of Cuba (R. 20).

The Attorney General stated that he was without information sufficient to form a belief as to the truth of petitioners' allegations that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters and that they have neither advised, represented, nor acted on behalf of Cuba in any such matters (R. 20).

Respondent denied plaintiff's allegations that their activities are specifically exempted from registration by Section 3(d) of the Act (R. 20). In response to petitioners' allegation that, unless they register, "they face indictment and prosecution for violation of the Act," respondent stated only that "any person who wilfully fails to file a registration statement as required by the statute is subject, upon conviction

thereof, to criminal penalties as provided therein" (R. 4, 20). Respondent admitted that the Act does not provide an administrative remedy and averred that Congress has provided an adequate remedy at law (R. 21).

Respondent then moved for judgment on the pleadings (R. 21) which motion the district court denied without opinion (R. 22). On the government's appeal under the Interlocutory Appeals Act (28 U.S.C. 1292(b)) (R. 23), the court of appeals, in an opinion by Judge Wright (Judge Fahy dissenting), reversed. The court held that the suit was "[i]n effect * * * an effort to restrain the Attorney General from prosecuting [petitioners] under the Act"; that there had been no consent to suit by the United States; and that the action was maintainable, if at all, only if petitioners' claims fell within the rule stated in *Ex parte Young*, 209 U.S. 123, and reiterated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 702, and *Malone* v. *Bowdoin*, 369 U.S. 643, 647, "that an officer of the United States may * * * be sued in his individual capacity where the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void'" (R. 27–28). Upon finding that petitioners had failed to challenge the constitutionality of the Registration Act, on its face or as applied, or the authority of the Attorney General to enforce it, the court ordered the case dismissed on the pleadings

as an unconsented suit against the United States (R. 29). Judge Fahy, dissenting, would have held that the action is within the exception to the doctrine of sovereign immunity for suits against officials acting in excess of their statutory authority (R. 29–34).

On May 1, 1963, the court of appeals, *en banc*, denied a petition for rehearing (R. 35).

SUMMARY OF ARGUMENT

Petitioners, attorneys engaged since 1960 in representing the Republic of Cuba, brought this action against the Attorney General for a judgment declaring that they are exempt from the registration requirements of the Foreign Agents Registration Act. They claim that a prosecution for non-registration would injure their reputation and interfere with their ability to practice law and that compliance with the Attorney General's demand for registration would invade their privacy and make it difficult to retain co-counsel. This effort to obtain a civil test of the obligation to register is contrary to the statutory plan of the Act which envisions full and immediate disclosure enforced by criminal sanctions. Action by equity is unwarranted since petitioners have not demonstrated the threat of irreparable injury or alleged that the Registration Act is unconstitutional or that the Attorney General lacks authority to bring a prosecution. The court of appeals properly held that the suit should be dismissed as an unconsented action against the United States.

I

The design and purpose of the Registration Act indicate that Congress intended to make a defense to a criminal prosecution the exclusive means of testing the obligation to register. The Act, passed in 1938, represented a new type of legislation designed to force prompt public disclosure by persons being supplied from abroad with funds and other materials to influence the external and internal policies of the Nation. Congress required every person acting as an "agent, servant, representative, or attorney for a foreign principal" to file a registration statement "forthwith" supplying pertinent information as to their activities and employers. To achieve the objective of full and immediate disclosure, Congress provided substantial criminal penalties for noncompliance with the statute. It did not authorize a civil action by persons who question their obligation to register. Numerous amendments since 1938 have seen no change in the basic framework or purpose of the statute.

Petitioners' suit is in conflict with the Congressional purpose of full and immediate disclosure. If maintainable, foreign agents would be able to conduct their activities for years, as petitioners have been doing, without registration, pending a judicial determination that their activities bring them within the Act. The public would be denied the facts at the time when they are relevant to the formulation of opinion.

II

Petitioners have not made a sufficient showing to justify intervention by a court of equity.

A. Petitioners contend that the Court should exercise jurisdiction to grant relief in this declaratory judgment action because the standard prerequisites of justiciability are met. *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300, makes clear, however, that the denomination of an action as one for a declaratory judgment does not "deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles." The Court held that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. The same considerations apply here. Indeed, petitioners' suit, although labelled one for declaratory judgment, would have only one effect, to bar prosecution.

B. It is a general rule that equity will not intervene to prevent the enforcement of a criminal statute even though unconstitutional. This rule rests partly on the limited office of courts of equity. To restrain against the proceedings for the punishment of offenses "is to invade the domain of the courts of common law, or of the executive and administrative department of the government." *In re Sawyer*, 124 U.S. 200, 210.

The only exceptions to this traditional rule are cases in which the complainant meets two strict requirements. He must show not only that the prosecution

will subject him to irreparable injury but also that the statute on which the prosecution is founded is unconstitutional or that the administrative order triggering prosecution is in excess of the statutory authority. If he fails on the first point, there is no jurisdiction in equity. If he fails on the second, the suit is barred by sovereign immunity as the court below held.

Petitioners do not meet either requirement.

1. Petitioners have not shown irreparable harm. They have been representing the Republic of Cuba for over two years and are presently liable to prosecution. The defense they seek to raise here will be equally available in any criminal trial. Non-registration is a single offense and the continuation of their activities will not cumulate the potential penalties.

Petitioners claim that the stigma which will flow from indictment and prosecution, even assuming acquittal, will damage their reputation and impair their future ability to practice law. These allegations do not make out the "danger of irreparable injury 'both great and immediate.'" *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164. Equity will not intervene where the complainant faces prosecution for acts already committed and continuing without interference, merely to afford protection from the stigma of a criminal prosecution. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. To constitute irreparable harm the complainant must show that noncompliance would lead to multiple prosecutions with cumulative penalties for a single course of conduct.

Petitioners also allege that the damage to be anticipated from indictment and prosecution is so great that they will be forced to register—barring action by equity—and that registration will irreparably injure them by invading their privacy and making it difficult to obtain associate counsel whose privacy would also be invaded. These allegations do not constitute irreparable harm. Compliance would not put petitioners out of business or force them to pay confiscatory rates, for example. Indeed a scrutiny of the registration forms and the rules and regulations promulgated pursuant to the Act suggest that petitioners' conclusory allegations of harm are seriously inadequate. The information to be disclosed is simple. Certain questions are obviously inapplicable to a law firm. There is no certainty that petitioners would ever be required to answer all the questions on the statement, since the instructions provide that waivers may be obtained eliminating the need to answer "inappropriate or * * * burdensome" requirements. Petitioners have made no such requests. The absence of serious hardship is indicated by the fact that in the 26 years since passage of the Act some 1,675 individuals and firms have registered. Presently over 94 law firms and individual attorneys have statements on file showing that they are active foreign agents. These disclosures do not appear to have interfered with their practice of law.

2. In addition to their failure to show irreparable harm, petitioners' allegations do not meet the other condition prerequisite to equitable relief. Although peti-

tioners allege that the threat of prosecution and penalties for noncompliance is so serious that they will be forced to register, they do not assert that this constitutes an unconstitutional denial of judicial review, as in *Ex parte Young*, 209 U.S. 123. Their contentions that they are exempt from the registration requirements do not establish that the Attorney General lacks authority to bring a prosecution. 28 U.S.C. 507 charges the Attorney General with enforcement of the criminal laws and this authority includes the power to interpret the laws and decide when a prosecution is warranted. Since petitioners' suit would interfere with the Attorney General's performance of his official duty to prosecute criminal offenses, and since there is no allegation that he is threatening to go outside this statutory duty or his constitutional authority, the suit was properly dismissed as an action against the United States barred by the doctrine of sovereign immunity.

(*a*) It is part of the Attorney General's official duty to prosecute criminal offenses under the laws of the United States. His performance of that duty is an action of the United States. The relief sought would interfere with this action. It is, therefore, a suit against the United States without its consent, barred by the doctrine of sovereign immunity.

(*b*) The suit does not fall within either of the recognized exceptions of the doctrine of sovereign immunity; *i.e.*, that a suit against a government official becomes one against him as an individual if (i) the official exceeds his statutory authority, or (ii) that authority or its exercise is constitutionally void. As

to the first exception, petitioners assert that the Attorney General exceeded his authority in demanding their registration since their representation activities are limited to the mercantile and financial interests of the Republic of Cuba and, therefore, entitle them to exemption under Section 3(d) of the Act. Even if they were right as to the exemption, this would only establish that, if the Attorney General seeks an indictment, his action would be based upon "an incorrect decision as to law." This is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 683, 695. Petitioner has not made and could not make the required "affirmative allegation of any relevant statutory limitation upon the [Attorney General's] powers" to construe the statutes and apply them to the facts before him (R. 32). His power is to decide when and when not to bring a criminal prosecution, and his authority to decide would not be vitiated by proof that his decision, while bona fide, was erroneous.

Nor is there any basis for bringing this case within the second exception of the doctrine of sovereign immunity. As noted, petitioners do not claim that the Registration Act or the penalties provided for its enforcement are unconstitutional.

(*c*) The cases cited by petitioners in which relief has been afforded against the government fall within the exceptions to the doctrine of sovereign immunity stated in *Larson* v. *Domestic & Foreign Corp., supra*. Nor is there any basis for petitioners' argument that the doctrine is to be applied only where the suit brought involves government property. In each of

the cases cited, there were allegations that the government official or agency was acting in excess of its authority or the administrative action was in violation of specific constitutional guarantees. Similar allegations have not and cannot be made here.

To the extent that any of these cases may indicate a more liberal rule of the reviewability of final administrative action, they depend upon circumstances which are not present here. Each involved final administrative action implemented by an official order which was alleged to be in excess of authority but which was otherwise nonreviewable. The fact that judicial review was upheld in those circumstances does not establish that it is proper here, that the doctrine of sovereign immunity applies only where government property is at issue, or that the doctrine has no application in this case. We have found no case in which the Court has upheld jurisdiction—absent traditional bases for exception to sovereign immunity—where the action complained of was the bringing of a criminal prosecution in which the defendant could fully litigate all his claims and defenses.

ARGUMENT

INTRODUCTION

The Foreign Agents Registration Act is a disclosure measure. Its effectiveness depends upon prompt registration by persons acting as agents of foreign principals. To insure this prompt action, Congress has specifically required the filing of a registration statement before acting as such agent or within 10

days after becoming such an agent (Section 2(a), App., *infra*) and made failure to file punishable as a felony by a fine of up to $10,000 and imprisonment of 5 years (Section 8(a), App., *infra*). Consistent with this purpose, Congress made no provision for testing the obligation to register except in defense to a criminal prosecution. The possibility of protracted civil proceedings (such as those represented by this case) in which a person could contest his obligation to register while carrying on his activities in behalf of the foreign principal is repugnant to the purpose of the legislation "to prevent secrecy as to any kind of political propaganda activity by foreign agents."[1]

Petitioners have been engaging in activities in behalf of the Cuban government for over two years without registration. If their suit constitutes an attempt to obtain immunity from prosecution for these past and continuing activities, it is directly contrary to the statutory purpose. If maintainable, it would give private individuals the power to delay compliance with this prohibitory statute with criminal sanctions until a court issues, in effect, a cease and desist order. On the other hand, if petitioners are not contending that their action gives them immunity, the action is merely an attempt to add a civil forum to the criminal forum presently available to the government. Du-

[1] Mr. Justice Black, dissenting, in *Viereck* v. *United States*, 318 U.S. 236, 249, 250, quoting from the reports of the Senate and House Committees which considered the Foreign Agents Registration Act of 1938. S. Rep. No. 1783, 75th Cong., 3d Sess., H. Rep. No. 1381, 75th Cong., 1st Sess.

plicate proceedings on the same issues would be the result.

We shall show below that, if the purpose of the legislation is to be accomplished, civil suits may not be maintained to determine in advance whether a particular person is required to register and that the sole method which Congress provided for litigating that issue was by defense to any criminal prosecution for non-registration; that petitioners' effort to upset the statutory plan through a declaratory judgment action must further fail because they have shown no irreparable harm warranting the intervention of a court of equity and no unconstitutional or unauthorized action by the Attorney General avoiding the bar of sovereign immunity.

I

THE DESIGN AND PURPOSE OF THE REGISTRATION ACT INDICATE THAT CONGRESS INTENDED TO MAKE A DEFENSE TO A CRIMINAL PROSECUTION THE EXCLUSIVE MEANS OF TESTING THE LEGISLATION

The Foreign Agents Registration Act does not authorize a civil action by a person who questions his obligation to register and would like a judicial test of the issue short of a defense to a criminal prosecution for noncompliance. The language of the Act and the legislative history show that Congress acted knowingly and for the purpose of insuring full and immediate disclosure essential to its objective of keeping the people informed of the foreign sources of

information at the time such information is being distributed and received.[4] Its committees affirmatively stated that the "passage of this bill will force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill" (H. Rep. No. 1381, 75th Cong., 1st Sess., p. 3, S. Rep. No. 1783, 75th Cong., 3d Sess., p. 2).

The Registration Act was enacted originally in 1938 (52 Stat. 631) as a result of the recommendations of a special committee appointed in the Seventy-Third Congress to investigate "(1) the extent, character, and objects of Nazi propaganda activities in the United States [and] (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries * * *." On the basis of nine months of hearings in six different cities, this committee found that there were many persons in the United States representing foreign governments who were being secretly supplied with funds and other

[4] Mr. Justice Black stated the purpose of the initial Act as follows in *Viereck v. United States*, 318 U.S. 236, 251 (dissenting opinion):

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

materials to influence the external and internal policies of the country.[4]

To meet the problem, Congress adopted a new type of legislation[5] aimed solely at the prompt public disclosure of the facts concerning the spreading of public propaganda by foreign agents subsidized from abroad. Every "person"—including an individual, partnership, association, or corporation—"who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal" was required to file a registration statement "forthwith" supplying

---

[4] The Special Committee, of which Representative McCormack of Massachusetts was Chairman, was appointed pursuant to H. Res. No. 198, 73d Cong., 2d Sess. The Committee rendered its final report on February 15, 1935 (H. Rep. No. 153, 74th Cong., 1st Sess., p. 1), in which it found that "this country has been flooded with propaganda material" (*id.* at 8) from various alien organizations outside the United States, which were "engaged in vicious and un-American propaganda activities" (*id.* at 5) for the purpose of gaining "adherents" (*id.* at 4) and "to influence the political opinions of many of our people" (*id.* at 22), and also to "influence, if necessary and possible, our governmental policies (*id.* at 7). It further found that "all kinds of efforts and influence, short of violence and force, were used to obtain its desired objective, which was to consolidate persons * * * into one group, subject to dictation from abroad" (*id.* at 9). The evils arising from employment of ostensibly legitimate business connections as a "smoke screen" for propaganda activities were called forcibly to the attention of Congress in unequivocal terms.

[5] The Court so characterized the statute in *Viereck* v. *United States*, 318 U.S. 236, 241.

information as to his propaganda activities, employers and the terms of his contracts.[7] Statements were to be brought up to date every six months and a report of activities during the intervening period filed (52 Stat. 631 *et seq.*).

The dominant purpose of the legislation was full and immediate disclosure. The Senate and House Committee reports stated (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 2–3, S. Rep. No. 1783, 75th Cong., 3d Sess., p. 2):

> We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.
>
> Such propaganda is not prohibited under the proposed bill. The purpose of this bill is to make available to the American public, the sources that promote and pay for the spreading of such foreign propaganda. * * * Propaganda efforts of such a nature are usually conducted in secrecy, which is essential to the success of these activities. * * * *

In order to achieve these objectives, Congress provided criminal penalties for those who disregarded the requirement of registration "forthwith." But providing the public with adequate information also depended upon preventing such foreign agents from avoiding registration, even for a limited time, with-

[7] Persons who were acting as agents at the time the Act took effect were required to register within 30 days (52 Stat. 631).

out the risk of criminal prosecution and punishment. Thus, the objective of requiring immediate disclosure would have been defeated if foreign agents had been left free to avoid registration by bringing civil actions to determine whether their existing activities were within the statute. By the time such civil actions had run their course, the propaganda could have done its job or the agent might have been replaced by another who would be free to relitigate the same issues. In any event, the delay would have denied to the public the facts toward the disclosure of which the entire legislation was directed. Thus, the failure to provide any method for an agent to test in a civil proceeding his duty to register reflected a Congressional intent to preclude such a dilatory device.

The Registration Act has been amended four times, in 1939 (53 Stat. 1246), in 1942, when there was a comprehensive revision and broadening of the statute (56 Stat. 248), in 1950 (64 Stat. 399, 1005), and in 1961 (75 Stat. 784). Its basic purpose, however, remains as stated in the preamble to the 1942 amendments:[8]

> to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be in-

[8] See Statement of "Policy and Purpose," Act of April 29, 1942, 56 Stat. 248–249, reprinted in the notes to 22 U.S.C. 611.

formed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

Indeed, the legislative changes emphasize the Congressional purpose of full and immediate disclosure enforced by criminal sanctions. The Act now provides that "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement * * *," thus indicating that Congress expects to have the information in the public files at the time the agents begin their subsidized activities. A showing of "undue hardship" must be made to obtain an extension of time within which to file (28 C.F.R. 5.201). Foreign agents are to file copies of any political propaganda being disseminated by mail or in interstate commerce within 48 hours of the beginning of the dissemination (Section 4(a), 22 U.S.C. 614(a)). At the same time, the agent must report the nature of the materials being disseminated and the particulars of their distribution (28 C.F.R. 5.401). Registration statements and dissemination reports are to be available for public examination at the Department of Justice each day (Section 6, 22 U.S.C. 616; 28 C.F.R. 5.600).

It is obvious that the present disclosure statute would break down if numerous agents were able to conduct their activities in behalf of foreign governments—as petitioners are now doing and have been doing for over two years—without registration or otherwise complying with the Act, pending a judicial determination whether they are liable to its require-

ments. An agent can always devise a basis for a judicial challenge to his duty to register. If the speed of world events demanded immediate disclosure in 1938, events move many times as fast today. Issues on which foreign governments have retained agents to tell their story in this country—*e.g.*, the independence movement in Katanga Province in the Congo, the struggle of forces in the Dominican Republic—have arisen and disappeared during periods shorter than two years. It was the judgment of Congress that the people are entitled to know the source of information they are receiving on such issues at the time the issues are being debated. Suits such as petitioners', if maintainable, would thwart that determination.

It is also significant, we submit, that Congress has never moved to provide a civil remedy by which foreign agents could obtain an advanced determination of their liability to the registration requirements of the Act. The statute has been in operation for more than 26 years. Hearings have been held on its adequacy.[9] Successive amendments have been made tightening the registration requirements and increasing the penalties for noncompliance.[10] However,

[9] Hearings before Subcommittee No. 4 of the House Committee on the Judiciary, 77th Cong., 1st Sess., on H.R. 6045; H. Rep. No. 949 of the Committee on the Judiciary, to accompany H.R. 6817, 86th Cong., 1st Sess.; Hearings before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess., on S. 2136.

[10] As originally enacted in 1938, the statute provided for a fine of not more than $1,000 or imprisonment for not more than two years or both (52 Stat. 631). The penalties were increased to present levels in 1942 (56 Stat. 248).

there has been no move in the direction of granting civil jurisdiction of disputes over the meaning of the statute or its administration. Were such a step to be taken, it is inconceivable that the Congress would authorize agents to continue their activities pending a final judicial decision, as petitioners are doing here.

In summary, then, the role of the Registration Act is to insure that the people have at their command the facts with which to identify foreign-sponsored activities and publications so that these activities and statements may be wisely appraised at the time they occur. Petitioners' contention would give foreign agents and their principals the power to conceal these facts at the time they are relevant to the formulation of public opinion. In so doing, it would flaunt the obvious will of Congress, the recognized maxim that a court of equity will not intervene where the plaintiff has an adequate remedy at law and the established rule that the government cannot be sued without its consent.

II

PETITIONERS HAVE NOT MADE A SUFFICIENT SHOWING TO WARRANT INTERVENTION BY A COURT OF EQUITY

A. PETITIONERS' ACTION IS PROPERLY JUDGED BY THE EQUITABLE STANDARDS DEVELOPED WITH RESPECT TO SUITS TO ENJOIN A CRIMINAL PROSECUTION

Petitioners have captioned their suit as one for a declaratory judgment (R. 3) and limited their prayer for relief to a request for a declaration "that their

activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under Foreign Agents Registration Act * * * and [for] such other and further relief as may be appropriate" (R. 5). Relying upon *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240–241, they argue that the standard prerequisites of justiciability stated therein are met[11] here and, accordingly, that the Court should exercise jurisdiction and grant relief in this case (Br. 23–28). The *Aetna* case, however, does not stand for this proposition. All that the Court held there was that the dispute between the insurance company and its insured over whether a "disability" provision in the policy afforded a waiver of premiums presented a case or controversy within the jurisdiction afforded by the Declaratory Judgment Act. That is not the issue here. We do not dispute that, at least as to petitioners' past conduct, there is a case or controversy. The issue, however (sovereign immunity aside), is whether the circumstances warrant the court's exercise of its equity jurisdiction.

As to this question, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300, makes clear that the denomination of an action as one for a declaratory judgment does not "deprive courts of their equity powers or of their freedom to withhold relief upon established equitable

[11] Petitioners urge (Br. 23–24) that the controversy is definite and concrete; that it touches the legal relations of parties having adverse legal interests; and that a decree that their activities are or are not subject to the Act would end the dispute with finality.

principles."[12] The issue was whether a federal district court should exercise jurisdiction over a taxpayers' suit against the officer charged with administration and enforcement of the Louisiana Unemployment Compensation Law for a declaration that the law as applied to the taxpayers' dredging activities was unconstitutional and void. The Court recognized the traditional rule that courts of equity will not ordinarily restrain state officials from collecting state taxes where state law affords an adequate remedy, a practice that had been sanctioned by Congress in the Judicial Code (50 Stat. 738). The Court found it unnecessary, however, to determine whether the words of the provision—"to enjoin, suspend, or restrain"—might be construed so as to prohibit a declaration concerning the invalidity of the tax (*id.* at 299):

> For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

The same considerations apply here to petitioners' declaratory judgment action.

Petitioners' suit, although labelled one for a declaratory judgment, would have the same effect as a suit

---

[12] The Court emphasized that the House Committee Report on the Declaratory Judgment Act declared that "'large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure.' H.R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2; and see *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 494; Borchard, Declaratory Judgments (2d ed.) p. 312" (319 U.S. at 300).

for an injunction. Indeed, petitioners recognize this. They argue (Br. 27) that a judicial declaration "that the activities of the petitioners are not subject to the Act would end the dispute with finality. It would be binding upon the Attorney General. He would no longer insist on his demand that the petitioners register and the petitioners could continue their activities without the threat of indictment and prosecution." Thus, it is only reasonable that, as in *Huffman*, the need for extraordinary relief should be judged by the same standards applied to injunction suits. The effect of the declaration—and its only effect—would be to bar prosecution.

B. EQUITY WILL NOT ENJOIN A CRIMINAL PROSECUTION WHERE THE PLAINTIFF FAILS TO SHOW BOTH IRREPARABLE INJURY AND THAT THE PROSECUTOR IS ENFORCING AN UNCONSTITUTIONAL STATUTE OR OTHERWISE EXCEEDING HIS STATUTORY AUTHORITY

From earliest times the decisions of this Court have recognized and upheld the rule that equity will not ordinarily enjoin a criminal prosecution. *In re Sawyer*, 124 U.S. 200, 210–211; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164; *Terrace* v. *Thompson*, 263 U.S. 197, 214; see Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 862–864. As Chief Justice Stone stated for the Court in *Douglas* v. *Jeannette*, *supra*, at 163–164:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for

> equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Petitioners argue (Br. 32) that these cases involve state criminal statutes and that the rule has no application where a federal court is asked to enjoin a federal prosecution. Undoubtedly, the sensitive balance of federalism may afford an added reason why equity should stay its hand. However, the rule has no such restricted application. It rests in important part on the limited office of courts of equity as stated in the opinion of Mr. Justice Gray in *In re Sawyer*, 124 U.S. at 210:

> To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Indeed, the courts have repeatedly refused to enjoin federal officials from prosecuting violations of federal statutes. *E.g.*, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills* v. *Camp*, 74 F. 2d 200 (C.A. 5); *Sparks* v. *Mellwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (C.A. 8).

The only exceptions to this traditional rule of equity are cases in which the complainant meets two

strict requirements. He must show not only that the prosecution will subject him to irreparable injury but also that the statute on which the prosecution is founded is unconstitutional or that an administrative order triggering the prosecution is in excess of the statutory authority. The former requirement must be met to establish jurisdiction in equity. The latter is essential to avoid the bar of sovereign immunity. *E.g., Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98–100; *Watson* v. *Buck*, 313 U.S. 387, 400–401; *Ex parte Young*, 209 U.S. 123; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605; *Packard* v. *Banton*, 264 U.S. 140. So far as we can discover, equitable relief against the enforcement of a criminal statute has never been granted unless these two requirements have been satisfied.

The petitioners have not met either of these requirements. Their purported showing of irreparable injury is inadequate. They do not allege that the statute is unconstitutional as applied to them and have failed to show that the Attorney General is exceeding his authority in threatening prosecution.

1. Petitioners have not shown irreparable harm

It is plain that petitioners' case here is no different from any suit by an individual threatened with criminal prosecution to enjoin the prosecuting attorney from proceeding against him. Petitioners have been pursuing their activities in behalf of the Republic of Cuba for over two years. If, as the Attorney General believes, they have violated the Registration Act, they are liable to prosecution. They may defend on the

ground that the Act is inapplicable to their activities. Every allegation that petitioners make in this case on this issue could equally well be made in defense to any prosecution in which their liability would turn on the question of statutory interpretation. Their position can in no way become worse. Violation of the statute is a single offense and their continuation of these activities does not increase the penalties to which they are now liable.

Petitioners, in an effort to make out their claim of irreparable harm, allege (1) that the stigma which will flow from indictment and prosecution will seriously damage their reputation and impair their future ability to practice law, even assuming they are acquitted; and (2) that this damage, plus the threat of possible fine and imprisonment, is so great that they will be forced to register—barring action by equity—and registration, in turn, would irreparably injure them by invading their privacy and making it difficult to obtain associate counsel whose privacy would also be invaded. Plainly, these allegations do not make out the "danger of irreparable injury 'both great and immediate'" which the courts have required as one condition to the restraint of a criminal prosecution. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164.

The cases establish that the mere stigma of a criminal prosecution is not enough. *Fenner* v. *Boykin*, 271 U.S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. In *Spielman*, in the absence of irreparable harm, the Court applied "The general rule * * * that equity will not interfere to prevent the enforcement of

a criminal statute even though unconstitutional" (*id.* at 95). The threat of prosecution under the state's fair-competition statute did not constitute such harm since the statute did not prohibit continuance of the complainant's business or create a serious interference with its operation. The Court concluded that the case "was the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights. * * * [N]othing more than a single prosecution was in contemplation" (*id.* at 96). To the same effect that a single prosecution with liability to traditional penalties of fine and imprisonment does not constitute irreparable harm, see *Douglas* v. *Jeannette, supra; Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 49–50; *Southern Pacific Co.* v. *Conway*, 115 F. 2d 746, 749 (C.A. 9); *Stone* v. *Christensen*, 36 F. Supp. 739, 741 (D. Ore.); *Keegan* v. *State of New Jersey*, 42 F. Supp. 922 (D. N.J.) (three-judge court).

Ex parte Young, 209 U.S. 123, establishes that to show irreparable harm the complainant must allege that noncompliance with the statute would lead to multiple prosecutions with cumulative penalties for a single course of conduct. This was the case in *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (see *infra*) and in *Evers* v. *Dwyer*, 358 U.S. 202, on which plaintiff relies (Br. 31–32). In the latter case, the Court held that the complainant, a Negro, was entitled to a determination of the merits of his suit for a declaration that a state statute requiring segregated seating on buses was unconstitutional. The Court emphasized that the plaintiff could not use the city's trans-

portation facilities "without being subjected by statute to special disabilities" (*id.* at 204). Had plaintiff disregarded the "special disabilities" he would, of course, have been liable to successive prosecutions and cumulative penalties.

These cases answer petitioners' argument that the stigma of a single prosecution and the threat of fine and imprisonment, even assuming acquittal, alone constitute irreparable harm. Indeed, from the standpoint of their reputation and ability to retain associate counsel, there does not appear to be much difference between petitioners' going into court and stateing that the Attorney General has advised them that they are violating a criminal statute and the Attorney General's actually bringing a prosecution alleging the violation. Further, any indictment and prosecution would not reflect on petitioners' honesty or integrity since it would involve only the legal question whether their conceded activities as counsel for a foreign government bring them within the Act's registration requirements—essentially a test case. Even where the stigma attached to prosecution may be a real factor—such as where officers of business concerns are threatened with indictment for alleged antitrust violations—no equity court would enjoin such prosecutions on that ground alone where the same issues of law could be fully litigated in the criminal proceeding.

Thus, whatever claim petitioners may have to a threat of irreparable harm appears to rest not on the presence of criminal penalties (to which they are now liable if their past actions constitute violations of the Act) or on their desire to avoid having to defend against

a single criminal prosecution, but upon the asserted burdens which would be imposed if they determined to register as a means of avoiding the risks of prosecution. These allegations, however, do not constitute irreparable harm as that term is defined by the cases which petitioners cite (Br. 31–32). Thus, in *Adams* v. *Tanner*, 244 U.S. 590, and *Packard* v. *Banton*, 264 U.S. 140, compliance would have put the complainants out of business. In *Adams*, employment agencies obtained the aid of equity in testing a law which made it unlawful to receive a fee for furnishing a person with employment or information leading thereto. *Packard* involved a statutory requirement that persons in the business of carrying passengers for hire put up a $2,500-bond for each vehicle. The cost of the bond would have cut weekly earnings from $35 to $16.50 on each vehicle and obviously made the operation uneconomical. In *Ex parte Young, supra*, plaintiffs alleged that compliance with the regulatory statute would have required the payment of confiscatory rates (209 U.S. at 130).

Compliance with the Registration Act would impose no such burdens. Petitioners' complaint alleges that registration would result in a serious invasion of their privacy, that they would be required to disclose numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba and that compliance would interfere with their practice of law since other lawyers whom they might wish to retain might refuse to accept such employment if it entailed the disclosure of similar information. The inadequacy of these conclusory alle-

gations of irreparable harm is apparent from a scrutiny of the registration forms and the rules and regulations promulgated pursuant to the Act. Without cataloguing all the specifics of the 14 questions on the form for partnerships and the 9 on that for individuals, a brief review will show their reasonable nature and the reasonable manner in which respondent has administered the Act in this respect. On the form for organizations, including partnerships, questions 1, 2, and 4 request merely the name, address, date of organization and names of partners. Question 3 is clearly inapplicable and 5 is probably so."[11] Questions 6 and 7 ask the name of the foreign principal and the nature and purpose of the registrant's activities in its behalf. Question 8 states "Describe briefly all other businesses, occupations, and public activities in which Registrant is presently engaged" (R. 10). The Department has uniformly accepted statements such as "The general practice of law" from firms of attorneys in answer to this question.

Question 9 asks for the name and nature of services of employees and other individuals who render service to the registrant in behalf of the foreign principal. It is easily answered. Question 10 requests information as to the registrant's receipts from and expenditures in behalf of the foreign principal over the previous three-month period. Question 11 requests the

[11] Question 3 is limited to "nonbusiness membership organizations." Question 5 asks for limited data (*i.e.*, name, address, person in charge) concerning "all branches and local units of the Registrant and all other component or affiliated groups or organizations" (R. 8, 9).

registrant to identify speeches, lectures, radio broadcasts and publications made or delivered over the past three to six months. While it is framed in general terms, the Department has limited the request to those speeches, etc., which bear a reasonable relationship to the representation of the foreign principal. Question 12 asks for data concerning the registrant's affiliation or connection with foreign governments or political parties, as well as the registrant's pecuniary interest in or control over other partnerships, corporations, or other organizations. Question 13 calls for information concerning any ownership of or control over the registrant by any organization, groups or individuals and any subsidies received by the registrant from any organization, groups or individuals located in foreign countries. There is no indication that petitioners would have any response to make to these latter two questions, which are obviously framed for organizations other than law firms.

The final question requires the registrant to file copies of any agreement with the foreign principal and of any speeches, publications, etc., identified in answer to Question 11 as having been made or published during the period. It also requires the filing of short form registration statements by the partners and any employees and other individuals who render services or assistance, other than clerical, to the registrant for or in the interests of the foreign principal. The short form (R. 16–18) consists of nine questions which are similar in nature to those described above.

It should also be emphasized that there is no certainty that petitioners would ever be required to answer even all of these questions. Petitioners might well have secured relief, and may still secure relief from any hardship imposed in their case by particular questions. Thus, the instructions for completion of the registration form which are printed on its cover page provide:

> 5. *Answer All Items.*—All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable," so state.
>
> 6. *Inappropriate or Burdensome Requirements.*—If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement. Applications for such waivers should state fully the reasons why the waiver is desired.
>
> 7. *Information Not Obtainable.*—If any of the information called for by any item of this form is not known and cannot readily be ascertained, so indicate and state briefly the reasons why the information cannot be obtained.

Thus, it was open to petitioners to request waivers of any disclosure item which they believed to be inappropriate or unduly burdensome. However, no such requests were ever made and petitioners have not indicated what specific questions they find objectionable. If petitioners had sought such waivers and demonstrated the inappropriateness of certain questions insofar as their legal representation of Cuba is concerned, relief might have been granted in whole or in part. Since petitioners chose to forego these

procedures, certainly their general objections do not establish irreparable harm.

The absence of any serious hardship as a result of filling out the registration form is shown by the fact that in the 26 years since passage of the Registration Act, 1,675 individuals and firms have filed registration statements and only one prior action has been brought to avoid registration. *Joseph Brownfield and Richmond & Brownfield, Inc.* v. *J. H. McGrath,* Civil Action No. 4050–51 (D.D.C.). The district court (per Judge F. Dickenson Letts) dismissed that suit for injunction and no appeal was taken. Petitioners' assertion that registration would "seriously interfere with [their] practice of law" is substantially refuted by the fact that as of December 31, 1963, over 94 law firms and individual attorneys were registered as active foreign agents. The public files kept by the Department pursuant to Section 6 of the Act reveal that many of the nation's most prominent law firms are included among this group. To our knowledge none of these firms or individual attorneys, nor any of those who previously filed registration statements and have since become inactive as agents of foreign principals, have found that the necessary disclosures subsequently interfered with their practice of law.

2. The action is barred by sovereign immunity because petitioners make no claim that the Registration Act is unconstitutional and no showing that a decision to prosecute them would be in excess of the Attorney General's authority

Even where the complainant shows irreparable injury, he may not enjoin a criminal prosecution if the prosecutor is not exceeding his constitutional or statutory authority. For in the absence of such unconstitutional or unauthorized action, the suit is barred as an unconsented suit against the sovereign.

Congress has charged the Attorney General with responsibility for prosecution for all offenses against the United States (28 U.S.C. 507). Willful failure to register in accordance with the Foreign Agents Registration Act is made such an offense by Section 8(a) of the Act (22 U.S.C. 618(a)). Accordingly, it is part of the Attorney General's official duty to determine when to initiate prosecutions for violation of this statute, as any other, and his action in making this determination is the action of the United States. Petitioners' suit,[14] if successful, would interfere with

---

[14] As authority for the district court to hear their complaint, petitioners cite (R. 3) the District of Columbia Code, Sections 11–305 and 11–306, and the Declaratory Judgment Act (28 U.S.C. 2201). But 28 U.S.C. 2201 merely authorizes a court of the United States to render a declaratory judgment in "a case * * * within its jurisdiction." It is not in itself a grant of any jurisdiction which the courts do not have under some other statute. *Shelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671, *Alabama Federation* v. *McAdory*, 325 U.S. 450, 461–462; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 325. And see, *Ove Gustavsson Contracting Co.* v. *Floete*, 279 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894. The sections cited from the District of Columbia Code add nothing. Section 11–305 says that "in addition to its jurisdiction as a United States district court" the court has other jurisdictions—*e.g.*, as a "state" court or the inheritor of a State court. See, *Kendall* v. *United States*, 12 Pet. 524. Section 11–306 provides that the court shall have cognizance of "all cases in law * * * or in equity."

his performance of this duty by precluding a decision to prosecute them for failure to register. There is no allegation that the Attorney General is threatening to go outside his statutory or constitutional authority. The action is therefore, as the court of appeals held (R. 28 n. 9, 29), a suit against the United States barred by the doctrine of sovereign immunity.

a. This suit is barred by sovereign immunity because the relief sought would interfere with the public administration and would prevent the Attorney General from enforcing the Foreign Agents Registration Act

There is no room for question that petitioners' suit is one against the United States. Indeed, petitioners do not deny this aspect of the court of appeals' holding (see Br. 15). Whether a suit, although nominally directed against an individual officer, is in substance one against the United States is determined by "the essential nature and effect of the proceeding." *Ex parte New York*, 256 U.S. 490, 500, 502. Petitioners, in their complaint, do not purport to seek relief against respondent as an individual or private person. Their sole interest is in obtaining a declaration which, as they state (Br. 27), will be binding on the Attorney General and preclude him from seeking their indictment and prosecution for violation of the Registration Act. The aim of the litigation is to permit them to continue their activities in behalf of the Republic of Cuba without the threat of this allegedly wrongful government action. Thus, the "essential nature" of the action is an attempt to prevent the Attorney

General, in his official capacity, from exercising discretion to enforce the Foreign Agents Registration Act by prosecution.

In holding that such a suit is one against the United States to which it had not consented, the court below correctly applied the principles enunciated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, reaffirmed in *Malone* v. *Bowdoin*, 369 U.S. 643, and recently reiterated in *Dugan* v. *Rank*, 372 U.S. 609. The suit is against the sovereign if "the judgment sought would * * * interfere with the public administration" or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act" (*id.* at 620). The relief here, if granted, would clearly fall within both categories. It would preclude the Attorney General from enforcing the Registration Act by initiation of criminal proceedings where, in his judgment, willful violations have occurred. It would mean that he could not carry out the direction of the Congress that he prosecute all criminal offenses (28 U.S.C. 507). Indeed, the equity court would be substituting its judgment for the Attorney General's on this vital matter of public administration. To grant the relief would in short accomplish precisely what this Court said could not be done to the sovereign, without its consent: The enforcement of the Registration Act would be "stopped in its tracks." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 704.

b. This suit cannot be construed as one against the Attorney General as an individual

We recognize, of course, that, (1) if the Attorney General exceeds his statutory authority or (2) if that authority or its exercise is constitutionally void, he may be sued as an individual without the defense of sovereign immunity.[15] Neither exception is applicable here.

(1) Petitioners assert that the Attorney General "exceeded his statutory authority" in demanding that they file a registration statement (Br. 12). Their contention rests on allegations in their complaint that their representation activities are limited to legal matters including litigation involving the mercantile and financial interests of the Republic of Cuba and its governmental agencies; that these activities do not fall within the purview of the Act; and that they are specifically exempted by Section 3(d) which provides that the registration requirements shall not apply to:

> Any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *.

[15] A suit for specific relief may be maintained against a federal officer as an individual where the acts complained of are "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. at 647; *Dugan* v. *Rank*, 372 U.S. 621–622.

However, this question need not be decided here.[16] Even if petitioners were right as to their exemption, the Attorney General has exceeded no statutory limi-

[16] Were this question here, we would show that respondent's view that petitioners are required to register is correct. Section 1(c) of the statute makes the registration requirements specifically applicable to an "attorney for a foreign principal" and there is nothing in the Act which excludes an attorney who confines his activities to representation of the client. Section 3(d) of the Act exempts only those agents whose activities are of the ordinary, private commercial character in furtherance of the bona fide trade and commerce of the foreign principal. As a representative of a foreign government which controls the means of production and commerce within its borders and directly engages in trade and commerce, petitioners' activities in furtherance of these governmental interests are not considered private. Further, attorneys, as any other agents, are entitled to exemption only if their activities do not include "political activity" which is defined in Section 5.100(a)(11) of the Regulations (28 C.F.R. 5.100(a)(11)) to include:

> (ii) [f]urnishing information or advice to, or in any way representing, a foreign principal with respect to any matter pertaining to political or public interests, policies, or relations of any foreign government * * *, or the political interests of such foreign principal, or engaging in other activities in furtherance of such political or public interests, policies, or relations;
>
> * * * * *
>
> (vi) [e]ngaging in any activity to influence the enactment or repeal of any legislation affecting the political or public interests, policies, or relations of a foreign government, a foreign political party, or a foreign principal, or affecting the foreign policies or relations of the United States * * *.

None of petitioners' allegations suggest that they are not retained, for example, to afford legal advice with respect to the enactment of legislation of interest to their clients or to engage in other activities which are deemed "political" by the statute and regulations.

tation in any action taken to date. He has merely advised petitioners that in his judgment their registration is required by the law. In effect, he has given them advance notice that unless they register he will exercise his discretion to seek their indictment for violation of the Act. The statute imposes no duty that he give such notice, but certainly his doing so serves the interests of orderly administration and exceeds no statutory limitation.

Petitioners' real complaint is not with the demand for registration. Rather, their argument is merely that, if the Attorney General seeks an indictment, his action would be based upon "an incorrect decision as to law" with respect to the interpretation of the exemption provision of Section 3(d) of the Registration Act. This is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp., supra,* at 695. Petitioner has not made, and could not make, the required "affirmative allegation of any relevant statutory limitation upon the [Attorney General's] powers" (R. 32), as the government official charged with enforcement of the criminal laws (28 U.S.C. 507), to construe the pertinent statutes and apply them to the facts before him. The Attorney General's authority is not merely to seek indictments upon a construction of the laws and all the provisions of the Constitution which will ultimately be upheld as correct. He is given the power to bring the matter before a grand jury when in his judgment a violation of the law has occurred. His authority to decide, and to act upon his decision, is not vitiated by

proof that his decision, while bona fide, was erroneous. As in *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, where equitable relief against the government was denied, "The general construction of the statute is a distinct and profound exercise of discretion * * * [and] the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).[17]

Any error by the Attorney General in seeking an indictment for a violation of the Registration Act may be corrected before the grand jury or in the course of the ensuing criminal proceedings.

Petitioner's argument (Br. 16) that this reasoning would in effect preclude all judicial review has no merit insofar as the issue presented by this case is concerned. Civil review of the sovereign's exercise of discretion to bring criminal prosecutions is precluded where there is no consent and where the remedy at law by way of defense provides an adequate means of testing all questions. Indeed, if petitioners were correct, every person potentially liable to prosecution could obtain an advance ruling in the equity courts by

---

[17] See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 695, where the Court stated:

> [W]e have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.

The Attorney General is empowered to decide when and when not to initiate prosecutions.

claiming an erroneous interpretation of law by the Attorney General.

(2) Petitioners have not attempted to bring themselves within the second exception of the doctrine of sovereign immunity by claiming that the statutes which confer authority upon the Attorney General to prosecute willful violations of the Registration Act are unconstitutional or that his exercise of this authority in their case would be unconstitutional. They make no direct attack on the constitutionality of the registration requirements[18] nor of the provisions for the imposition of criminal penalties upon those who willfully refuse to comply. Their complaint does allege that indictment and prosecution would seriously damage their reputation and interfere with their practice of law (R. 5), and they argue this point (Br. 30–31) as a reason why equity should act in their behalf. However, continuing the position taken before the court of appeals (see R. 28 n. 8), petitioners do not attempt to bring themselves within the principle enunciated in *Ex parte Young*, 209 U.S. 123, 147, by arguing that these potential penalties are so severe that they amount to an unconstitutional denial of judicial review and an attempt to make the Attorney General's construction of the Act conclusive.

Indeed, petitioners could not bring this case within the rule of *Ex parte Young*. The holding there that

---

[18] *Viereck* v. *United States*, 130 F. 2d 945 (C.A. D.C.), reversed on other grounds, 318 U.S. 236 (see dissenting opinion at 251–252), and *United States* v. *Peace Information Center*, 97 F. Supp. 255 (D. D.C.), suggest that there is no basis for any such contention.

sovereign immunity was no bar depended upon the fact that persons who failed to comply with the rate regulation statute were subject to possible imprisonment (without regard to willfulness) and risked enormous and cumulative fines. Neither risk is present here. Nor is there realistically a basis upon which petitioners could claim that the statute denies them the right to test their legal arguments by continued noncompliance and defense to a criminal proceeding.

c. The doctrine of sovereign immunity was properly applied to this case

Petitioners argue that *Philadelphia Company* v. *Stimson*, 223 U.S. 605, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U.S. 177, establish that sovereign immunity does not bar a suit to restrain the executive from exercising his discretion to bring a criminal prosecution (Br. 14–16). These cases, however, merely represent applications of the rule stated in *Larson* v. *Domestic & Foreign Corp.*, *supra*. Thus, *Stimson* involved a dispute over the authority of the Secretary of War under an Act of Congress to draw a harbor line across the company's property and to prevent it from building a wharf on their property beyond that line. The complaint alleged that the Secretary's authority to draw harbor lines had been exhausted prior to the action complained of, that the severe penalties prescribed by Congress for construction beyond any harbor line and the threat of prosecution prevented the company from using the prop-

erty, that this constituted a taking for public use without just compensation, and that any effort to use its property would subject the company to multiple prosecutions (223 U.S. at 617). These allegations represent sufficient claims of unauthorized and unconstitutional action enforced by the threat of multiple prosecutions to lift the bar of soverign immunity. *Shields* presented a similar situation. There the petitioner sued to obtain review of an Interstate Commerce Commission determination that it was an interurban railway. It alleged that the ruling required it to comply with statutory and regulatory provisions which would put it out of business and that each day of noncompliance constituted a separate offense. The ruling was non-reviewable in the course of such criminal proceedings.[19]

[19] The background of the case was this: The Railway Labor Act applies to railways other than the electric interurban ones; the Act directs the Interstate Commerce Commission, upon the request of the Mediation Board, to determine whether a particular line is within the exception. The Commission, upon request of the Mediation Board, held after hearing that the Utah railroad was not an interurban electric railway. The Mediation Board ordered the railroad to post certain notices required by the Labor Act and failure to do so subjected the carrier to criminal penalties, with each day of noncompliance constituting a separate offense. The railroad brought suit against the United States Attorney to restrain him from criminally prosecuting it for violation of the Act, contending that it was in fact an interurban railway and that compliance with the Act would put it out of business. See *Shields* v. *Utah Idaho Cent. R. Co.*, 95 F. 2d 911 (C.A. 10). The government did not challenge the court's jurisdiction to entertain the action (305 U.S. at 183). This Court, holding that the Commission's de-

Nor is there merit to petitioners' argument (Br. 17–20) based upon its reading of *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, and *Stimson* and *Shields*, that the doctrine of sovereign immunity is to be applied only where the suit brought is for specific performance of a government contract, for government funds or for specific property in the possession of the government (Br. 17). *Shields* and *Stimson* afford no support for this contention, resting as they do upon traditional concepts of sovereign immunity. The same may be said for many other cases cited by petitioner (Br. 18–19) and in none of these did the Court enunciate the rule of limited sovereign immunity which petitioner would apply here.

American School of Magnetic Healing offers a good illustration. The school brought suit against the local postmaster alleging that he was holding mail addressed to it pursuant to an order of the Postmaster General which declared that the school was conducting a scheme for obtaining money through

---

termination was binding on both the carrier and the Mediation Board and noting that the determination was not otherwise subject to judicial review (305 U.S. at 182, 183), ruled that the carrier "was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (*id.* at 184). Thus, as in *Ex parte Young*, the suit to enjoin the criminal prosecution was maintainable because it was the only means by which the railroad could test the legality of the Commission's determination which would have been binding in any criminal action brought against the carrier for noncompliance with the Railway Labor Act.

the mails by false pretenses; that their business was in fact a legitimate one; that the Postmaster General was acting in excess of his statutory authority which was limited to cases of fraud; and that the statutes which purportedly authorized his action were in violation of the Fourth, Fifth and Fourteenth Amendments in that they deprived persons of their property without due process and failed to afford any opportunity to test the legality of the administrative action in the courts. The case was decided on a demurrer by the government which admitted the fact that the school's business was legitimate. Accordingly, the suit was within both exceptions of the doctrine of sovereign immunity—the postmaster was acting in excess of his authority which was limited to the exclusion of fraudulent mail and the statute, pursuant to which he acted, was alleged to be constitutionally void. The fact that the Court did not discuss the sovereign immunity question may suggest that the government conceded its liability to suit. In any event, the decision should afford no support for petitioners' claim that the government has no sovereign immunity except in cases involving disposition of its property.

Harmon v. *Brucker*, 355 U.S. 579, cited by petitioners, is a similar case. There, the complainant alleged that the Secretary of the Army had acted in excess of his statutory authority and in violation of the First, Fifth and Sixth Amendments to the Constitution as well as of Articles I and III in issuing him a discharge in form other than "honor-

able" based in part upon pre-induction activities.[20] The Solicitor General conceded that the Secretary's action could not be sustained if reviewable, but contended that the district court had no jurisdiction in light of the provision of 38 U.S.C. (1952 ed.) 693h that the findings of the Review Board shall "be final subject only to review by the Secretary of the Army" (*id.* at 581). The Court, citing *American School of Magnetic Healing* and *Stimson*, held that jurisdiction to grant relief was available. While the issue was not argued on the basis of sovereign immunity, it seems clear that the claims that the action was constitutionally void as well as in excess of the Secretary's statutory authority bring the case within the exceptions to the doctrine recognized in *Larson*.[21]

[20] The Court concluded that the Secretary's authority to issue discharges (10 U.S.C. 652a) was limited by the statutory provision (38 U.S.C. (1952 ed.) 693h) which provided for review by the Army Board of Review of the exercise of that authority. Section 693h expressly required that the findings of the Review Board "shall be based upon all available records of the [Army] relating to the person requesting such review * * *" (355 U.S. at 582–583). The Court held that the word "records" as there used meant records of military service and that "the type of discharge to be issued is to be determined solely by the soldier's military record in the Army" (*id.* at 583).

[21] Of the other cases cited by petitioners, *Kent* v. *Dulles*, 357 U.S. 116, 129, cited and followed *Stimson*, as did *Service* v. *Dulles*, 354 U.S. 363, 385, 386. The later case of *Vitarelli* v. *Seaton*, 359 U.S. 535, relied upon *Service*. *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, went on the ground that the Secretary had not acted in excess of his authority; *Perkins* v. *Elg*, 307 U.S. 325, was a deportation case. There was jurisdiction to test the action by habeas corpus, and the Court allowed a declaratory judgment as an alternative remedy. *Ramspeck* v. *Trial Examiners Conf.*, 345 U.S. 128, also cited, seems to have been based on the Administrative Procedure Act.

We would have a similar case here if petitioners, for example, had alleged that the Registration Act could not constitutionally be applied to require their registration or that a decision to prosecute them would violate some limitation upon the Attorney General's discretionary authority over enforcement of the criminal law. The bar of sovereign immunity necessarily depends on the claims made against the government. Having chosen not to raise a constitutional issue and being without a basis for a claim of any violation of a statutory limitation upon the Attorney General's authority to prosecute, petitioners should not be heard to complain that their suit was treated differently from the cases on which they rely.

To the extent that statements of the Court in cases cited by petitioners, *e.g.*, *Stark* v. *Wickard*, 321 U.S. 288, *Harmon* v. *Brucker*, *supra*, *Service* v. *Dulles*, 354 U.S. 363, *Vitarelli* v. *Seaton*, 359 U.S. 535, suggest a more liberal rule of reviewability of final administrative action, we believe they have application only in the circumstances in which the cases arose. In each of these cases, it was alleged—and found—that final and otherwise non-reviewable administrative action was in excess of the authority granted by the statutes or regulations.[22] Here, no comparable allegations could be made. Whether right or wrong, the At-

[22] Faced with this contention in *Stark* v. *Wickard*, *supra*, at 290, the Court referred to "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy."

torney General has authority to decide to prosecute and the correctness of his interpretation of the statute upon which the prosecution is founded is fully reviewable. Further, in each of these cases there was formal administrative action culminating in an order. These circumstances afford a basis for judicial review to determine whether the order was authorized. Such a basis is totally lacking where the complaint concerns simply the action of the Attorney General in bringing or not bringing a prosecution. There is no order here. There is not even any formal public action. There is nothing suitable for review.

Even if the cases stand for the proposition that the Court will afford review of final administrative action which interferes with the legal rights of a private party, this in no way suggests the restriction of the doctrine of sovereign immunity for which petitioner contends. Thus, we have found no case in which the Court has upheld jurisdiction—absent the traditional bases for exception to the government's sovereign immunity—where the action complained of was merely the bringing of a criminal proceeding in which the defendant could fully litigate all his claims and defenses.

Further, in none of the cases cited by petitioner was the controlling consideration the subject matter of the suit. The court's attention was directed to the claims asserted as well as the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign and interfere with the public administration, suits against government officials have frequently been

held to be barred as suits against the United States, even though property was not involved.[23]

Practical considerations show the need for invoking the doctrine of sovereign immunity here. The statutory arrangement for prompt and full disclosure by foreign agents depends upon the presence of criminal sanctions for those who fail to comply. To allow persons whom the government believes to be required to register to raise their legal defenses in the equity courts will mean years of delay (if pendency of the action precludes prosecution) during which they may continue activities in behalf of their foreign principals without registration. If initiation of the suit leaves the government free to prosecute, duplicate proceedings would result impeding the administration of the law and serving no legitimate purpose. In our view, dismissal of this suit imposes no unwarranted injustice. Petitioners may still seek a hearing before the respondent in accordance with Rule 2 of the Regulations[24] and present the facts upon which they rely in claiming to be exempt from registration. If they should ultimately decide to register, they may seek waivers of

---

[23] See *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524 (C.A. 5) (official action of Regional Director of Wage-Hour Division); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C.A. 4) ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10) (same).

[24] 28 C.F.R. 5.2 (App., *infra*) provides a procedure whereby the Attorney General will rule upon inquiries concerning "application of the act [which] shall be accompanied by a detailed statement of all facts necessary for a determination of the question submitted * * *." Petitioners never sought to avail themselves of this procedure.

questions which they consider inappropriate or unduly burdensome. If, on the other hand, they maintain their position against registration, then, as with any statute which relies on criminal sanctions for obedience, they may test their defenses in any criminal prosecution which ensues.

Petitioners' attempt to avoid these statutory procedures runs counter to the admonition in *Decatur* v. *Paulding*, 14 Pet. 497, 516—that the "interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *."

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
STEPHEN J. POLLAK,
Assistant to the Solicitor General.
GEORGE B. SEARLS,
DORIS H. SPANGENBURG,
Attorneys.

FEBRUARY 1964.

APPENDIX

1. The Declaratory Judgments Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, provides:

> CREATION OF REMEDY. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

2. 28 U.S.C. 507 provides in pertinent part:

> DUTIES; SUPERVISION BY ATTORNEY GENERAL.
>
> (a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:
>
> (1) Prosecute for all offenses against the United States;
>
> * * * * * *
>
> (b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties.

3. The Foreign Agents Registration Act of 1938, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.*, provides in pertinent part:

> SECTION 1 [22 U.S.C. 611].—DEFINITIONS:
> As used in and for the purposes of this subchapter—

(a) The term "person" includes an individual, partnership, association, corporation, organization, or any other combination of individuals;

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political part;

* * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

* * * * *

(k) The term "registration statement" means the registration statement required to be filed with the Attorney General under section 612(a) of this title, and any supplements thereto required to be filed under section 612(b) of this title, and includes all documents and papers required to be filed therewith or amendatory thereof or supplemental thereto, whether attached thereto or incorporated therein by reference;

* * * * *

SECTION 2 [22 U.S.C. 612]—REGISTRATION STATEMENT; FILING; CONTENTS.

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto * * * or unless he is exempt from registration under the provisions of this subchapter. Except as hereinafter provided, every person who is an

agent of a foreign principal on the effective date of this subchapter shall, within ten days thereafter and every person who becomes an agent of a foreign principal after the effective date of this subchapter shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath, on a form prescribed by the Attorney General, * * *. The obligation of an agent of a foreign principal to file a registration statement shall, after the tenth day of his becoming or acting as such agent, continue from day to day * * *.

* * * * *

(b) Every agent of a foreign principal who has filed a registration statement required by subsection (a) of this section shall, within thirty days after the expiration of each period of six months succeeding such filing, file with the Attorney General a supplement thereto under oath, on a form prescribed by the Attorney General, which shall set forth with respect to such preceding six months' period such facts as the Attorney General, having due regard for the national security and the public interest, may deem necessary to make the information required under this section accurate, complete, and current with respect to such period. * * *

* * * * *

SECTION 3 [22 U.S.C. 613, AS AMENDED, ACT OF OCTOBER 4, 1961, 75 STAT. 784]—EXEMPTIONS.

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals:

* * * * *

(d) Any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *;

* * * * *

SECTION 8 [22 U.S.C. 618]—ENFORCEMENT AND PENALTIES.

(a) Any person who—

(1) willfully violates any provision of this subchapter or any regulation thereunder, or

(2) in any registration statement or supplement thereto or in any statement under section 614(a) of this title concerning the distribution of political propaganda or in any other document filed with or furnished to the Attorney General under the provisions of this subchapter willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading, shall, upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

* * * * *

4. The Rules and Regulations Governing Administration of the Foreign Agents Registration Act of 1938 (28 C.F.R. 5.1 *et seq.*), provide in pertinent part:

Rule 2 (28 C.F.R. 5.2):

Inquiries concerning the application of the act shall be accompanied by a detailed statement of all facts necessary for a determination of the question submitted, including the identity of the agent, the nature of his activities on behalf of each foreign principal, any activities on his own behalf, and on behalf of any other person, by reason of which registration may be required, the identity of each foreign principal, and an outline of any agreement or agreements under which the agent is acting.

Rule 100 (28 C.F.R. 5.100):

DEFINITIONS.

(a) As used in this part, unless the context otherwise requires:

* * * * *

(11) the term "political activity" includes, but shall not be limited to, any of the following:

* * * * *

(ii) Furnishing information or advice to, or in any way representing, a foreign principal with respect to any matter pertaining to political or public interests, policies, or relations of any foreign government or foreign political party, or the political interests of such foreign principal, or engaging in other activities in furtherance of such political or public interests, policies, or relations.

* * * * *

(vi) Engaging in any activity to influence the enactment or repeal of any legislation affecting the political or public interests, policies, or relations of a foreign government, a foreign political party, or a foreign principal, or affecting the foreign policies or relations of the United States.

* * * * *

Rule 300 (28 C.F.R. 5.300):

BURDEN OF ESTABLISHING AVAILABILITY OF EXEMPTIONS.

In all matters pertaining to exemptions, the burden of establishing the availability of the exemption shall rest upon the person for whose benefit the exemption is claimed.

U.S. GOVERNMENT PRINTING OFFICE: 1964

IN THE

Supreme Court of the United States

October Term, 1963

No. [illegible]

Victor Rabinowitz and Leonard B. Boudin,
Petitioners,

v.

Robert F. Kennedy, Attorney General of
the United States

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

David Rein
Attorney for Petitioners

Press of Byron S. Adams, Washington, D.C.

STATUTES, RULES AND LEGISLATIVE MATERIALS

TREATISES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ and LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

I. The Complaint States a Cause of Action Under Normal Equity Standards

The government's brief (pp. 25-27) belabors the obvious and undisputed point that the exercise of declaratory judgment jurisdiction rests on the same discretionary considerations normally considered in equity actions. That discretion, however "is to be liberally exercised in order to achieve the purposes" of the Declaratory Judgment Act. 6 Moore Federal

Practice (2d ed.), 3030; *Aetna Casualty Insurance Co.* v. *Quarles*, 92 F. 2d 321.[1] And it must be an informed discretion based on rational considerations (see Moore, op. cit., 3025-3047 for a discussion of these considerations). Some of these were listed in the *Aetna* case, *supra*, at 325-6. The courts should refuse a declaratory judgment where another court (especially a state court) has jurisdiction of the issue; where a proceeding involving the issue is pending in another tribunal; where a special statutory remedy is provided; or where another remedy "will be more effective or appropriate under the circumstances." See *Nye* v. *United States*, 137 F. 2d 71.

The present case, however, meets the equity standard.[2] The plain fact is that unless the petitioners are able to obtain relief in this proceeding, they have no adequate judicial relief. The statute, in the circumstances of its application, is just as much an *in terrorem* statute as that involved in *Ex parte Young*, 209 U.S. 123. Quite understandably, petitioners, who

---

[1] See *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 243:

"... when all the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend on a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power ... the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed."

[2] The majority below never considered this question. The dissenting opinion of Judge Fahy (R. 29-34) did consider it and demonstrated quite clearly that the present suit falls within normal equity doctrine. And although the trial court wrote no opinion, its denial of the government's motion for judgment on the pleadings necessarily involved a determination that petitioners' complaint stated a cause of action in equity.

would be the object of a criminal prosecution under the statute are not as sanguine as the respondent as to the consequences that might flow from an indictment and prosecution. And in a different context Mr. Katzenbach, Deputy Attorney General, and presumably an authorized spokesman for the Justice Department, expressed his agreement with the petitioners as to the dire consequences to attorneys which might result from a criminal prosecution under the statute. See Hearings before the Senate Committee on Foreign Relations on S. 2136, 88th Cong., 1st Sess., (hereinafter referred to as Hearings) at p. 26.[3]

The government argues (Br. 32) that petitioners will suffer no irreparable harm from a prosecution because the case is "essentially a test case" and "any indictment and prosecution would not reflect on petitioners' honesty and integrity since it would involve only the legal question whether their conceded activities as counsel for a foreign government bring them within the Act's registration requirements." But a successful prosecution of the petitioners will not culminate in a mere order to register. If the government succeeds, the end result will be a finding that petition-

---

[3] Mr. Katzenbach told the Senate Committee on Foreign Relations considering amendments to the Foreign Agents Registration Act the following:

> "Of course, Senator, the penalty of being convicted of a felony, even if the fine was small or if no jail sentence was imposed can, in many instances, be a very heavy penalty indeed, just simply to have a conviction. This is not true in the corporate situation but in the individual situation to have been convicted of a felony, for example, in the case of a lawyer, amounts to automatic disbarment in most instances. I do not know whether a year in jail added to that adds very much when he has that kind of a penalty . . ."

ers are guilty of a felony and subject to a five year jail sentence, a $10,000 fine and whatever other consequences might flow from a felony conviction.

A criminal prosecution is not a proper forum for a "test" case. The stakes are too high where the possible consequences for being wrong on one's understanding of the law is a five year prison sentence followed by disciplinary proceedings. The government's reassurance in its brief as to petitioners' "honesty and integrity" is only slim comfort in the face of these hazards. It does not constitute a stipulation that petitioners should not be punished nor would such a stipulation be binding on a court in any event. In short, absent the opportunity to test the obligation to register in a proceeding such as the present, the threat of prosecution alone would be sufficient to compel petitioners to forego their important right of privacy and to register even if they are exempt. In essence, the respondent's complaint is that permitting the bringing of a declaratory judgment action, such as the present, will deprive him of the coercive power to compel registration by individuals who are expressly exempted from registration by Congress.[4]

As we have shown in our main brief (pp. 28-32) this is precisely the type of situation for which declaratory

[4] In arguing that the invasion of privacy resulting from registration is not a serious deprivation of rights, the government cites (Br. 37) the fact that 1675 individuals and firms, including 94 law firms and individual attorneys have registered under the Act. We may assume that these firms and individuals were either covered by the Act, or else, like petitioners, were exempt, but nevertheless surrendered their right to privacy because of the fear of prosecution. On the other hand, some law firms have refused to represent foreign principals because they "just do not like the idea of being called foreign agents," when they were doing nothing more than practicing law. See Hearings at p. 100.

judgment relief was designed, because a criminal prosecution is simply not adequate for the testing of the meaning and application of a statute such as the Foreign Agents Registration Act.[5] It was the recognition of this factor that led Mr. Katzenbach to request that Congress give the Department the power to enforce the statute by injunctive proceeding, arguing that the Department should have the same right to test the application of the statute in a civil proceeding as those requested to register had to test their obligation through a declaratory judgment proceeding.[6] Mr. Katzenbach's testimony demonstrates that, apart from the current litigation, the Department of Justice believes it to be fair, equitable and highly desirable to permit potential defendants under the Foreign Agents Registration Act to bring a declara-

[5] If, as suggested by the government (Br. 46) and by Mr. Katzenbach in his testimony before the Senate Foreign Relations Committee (Hearings, pp. 23-24), a failure to register based on a good faith belief in exemption is not a violation of the statute, then a criminal prosecution would fail to resolve this "test" issue. Since the government concedes petitioners' good faith, they would be entitled to a judgment of acquittal whether or not they were obligated to register, and the court might never reach or resolve the latter question.

[6] The proposed Act S. 2136 would give the Department the power to seek injunctive relief (See Hearings at p. 4). In response to a question from Senator Sparkman as to whether the Department had injunctive power under the Act in its present form, Mr. Katzenbach replied (Hearings, pp. 24-25):

> "I think not, Senator. There have been a couple of instances of a declaratory judgment, but this is where the action is brought not by the Government, but by a potential defendant, and he has the capacity to go into court and say that the Government is threatening him with a criminal prosecution if he does what he is entitled to do, and he can get a declaratory judgment on it. We do not have the same sort of power. . . ."

tory judgment action to test their obligation to register.[1]

There is no merit to the government's contention (Br. 17-24) that Congress intended that a criminal prosecution be the exclusive method for testing the meaning and applicability of the statute. The government fails to point to any statutory language which so provides. Nor is it to be presumed, in the absence of an express Congressional statement, that Congress meant to deprive potential defendants under the Foreign Agents Registration Act of whatever judicial remedies might otherwise be available to them either under the Declaratory Judgment Act or normal equity principles. The government's strained effort to uncover such intent from the Congressional purpose of forcing disclosure of the source of foreign propaganda material, so that the public would know its origins (see Govt. Br. 17-24 and the excerpts from the legislative history quoted therein) is especially wide of the mark. The complaint alleges (R. 3-4) and the government does not dispute (R. 26) that petitioners do not engage in propaganda, public relations, or lobbying of any kind. Nor is there any secret about their representation of the Republic of Cuba as attorneys. Since the public has been receiving no propaganda from the petitioners, respondent's argument about the need to inform the public as to the source of the propaganda it receives is pointless as applied to the present case. Respondent's emphasis on the purposes of the statute

[1] Both the language of S. 2136 (Sec. 7(2)) and Mr. Katzenbach's testimony flatly contradict the government's assertion (Br. 24) that "there has been no move in the direction of granting civil jurisdiction of disputes over the meaning of the statute or its administration."

as forcing the disclosure of foreign propaganda agents serves only to demonstrate the validity of petitioners' contention that the statute does not cover their activities.

Respondent apparently is not without misgivings about the harshness and injustice arising from the requirement of registration under penalty of criminal prosecution in cases where there is an honest dispute as to the coverage of the Act. It offers the following as a palliative for this harsh result: "Petitioners may still seek a hearing before the respondent in accordance with Rule 2 of the Regulations[8] and present the facts upon which they rely in claiming to be exempt from registration. If they should ultimately decide to register, they may seek waivers of questions which they consider inappropriate or unduly burdensome" (Br. 53-4). But this offers no solution for petitioners' dilemma. Their contention that they are not covered by the statute has already been rejected by respondent. Their problem is how to obtain a judicial review of this determination without the hazards of a criminal prosecution.

The same difficulty inheres in respondent's suggestion that petitioners "may seek waivers of questions which they consider inappropriate or unduly burdensome." What if the respondent, in his administrative capacity does not take the same position as suggested

---

[8] In a footnote respondent states "Petitioners never sought to avail themselves of this procedure." According to the pleadings, however (R. 4, 20), petitioners discussed the issue of their obligation to register with the respondent, and he rejected their protestations that they were not covered by the Act.

in his brief (Br. 32-37),[9] and requires petitioners, under the threat of a criminal prosecution, to complete the registration forms which involve a gross invasion of privacy on matters completely irrelevant to petitioners' representation of their foreign principal? Will petitioners then be able to come into court for judicial review? If so, then there is no reason why petitioners cannot raise the issue of their exemption from the Act in this proceeding.[10] On the other hand, dismissal of this suit will impose an "unwarranted injustice" (Govt. Br. 53) if the administrative remedy which the Department now offers the petitioners is not subject to judicial review.

Nor is there any question here of the Court's interference with the Attorney General's "discretion" or "judgment" (see Govt. Br. 40). As the respondent's brief acknowledges (p. 42, fn. 16), the sole issue presented by the proceedings is the legal issue as to whether or not section 3(d) of the Act exempts "a representative of a foreign government which controls

---

[9] The respondent apparently acknowledges that the bulk of the information sought by his registration forms has no relation to the activities of the petitioners, and apparently would be satisfied with a registration statement in which petitioners give little more than their firm name and address and the fact that they represent the Republic of Cuba in legal matters. If that is all that is required, petitioners have already made this information public both by filing their complaint in this action and their numerous court appearances on behalf of the Republic of Cuba, see e.g., *Banco Nacional de Cuba* v. *Sabbatino, et al.*, No. 16, this Term. Under this view the whole issue of petitioners' registration is meaningless and absurd.

[10] We do not understand respondent to contend that petitioners have failed to exhaust their administrative remedy. The complaint alleges (R. 5) and the answer admits (R. 21) that there is no administrative remedy.

the means of production and commerce within its borders and directly engages in trade and commerce.'"[11] And there is no basis for the argument that Congress entrusted the interpretation of the Foreign Agents Registration Act to the "judgment" and "discretion" of the Attorney General. The construction and interpretation of Congressional statutes is the responsibility of the courts and not of the Attorney General.[12] The sole question here is whether the courts may exercise that responsibility in the present proceeding, or must wait until the question is brought before it in a criminal proceeding. In either case, there is no issue of the Court's interfering with the Attorney General's

---

[11] Respondent suggests in the same footnote that there may also be a question as to whether petitioners are engaged in "political" activities as defined in respondent's regulations. It states:

> "None of petitioners' allegations suggest that they are not retained, for example, to afford legal advice with respect to the enactment of legislation of interest to their clients or to engage in other activities which are deemed 'political' by the statute and regulations."

But the complaint alleges (R. 3-4) that petitioners were "retained by the Government of the Republic of Cuba to represent in the United States the Republic of Cuba and governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba. . . . The retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, nor have the plaintiffs advised, represented, or acted on behalf of the Republic of Cuba in any such matters." The answer stated (R. 20) that respondent had no information to the contrary.

[12] *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, relied on by the government for its contention (Br. 44) is entirely inapposite. The Court held there that Congress did entrust to the "judgment" and the "discretion" of the Panama Canal Co. the prescribing of tolls for the Panama Canal. It is no precedent for the argument that Congress entrusted to the Attorney General's "discretion" the interpretation of a criminal statute.

"discretion" or "judgment" because it disagrees with his interpretation of the statute.

Further, it should be noted that although both sides agree that the merits of the petitioners' obligation to register is not before the Court (See our main brief p. 25, fn. 18, Govt. Br. p. 42, fn. 16) the present posture of the case poses the question as to whether petitioners may bring a declaratory judgment action on the assumption that they are exempt. By denying the government's motion for judgment on the pleadings (R. 22), the trial court necessarily held that the complaint stated a cause of action, and that on the face of the complaint petitioners were exempt from the requirements of registration under the Act.[13] In that context, the government designedly chose to take an interlocutory appeal posing only the question as to whether or not, assuming petitioners are exempt, they "may have their rights adujdicated by a declaratory judgment action," and the trial court, in accordance with the provisions of 28 U.S.C. 1292(b) granted that appeal (R. 22-23).

II. Petitioners' Failure to Raise Constitutional Questions

Both the government (Br. 45, 51) and the majority below (R. 28) argue that the suit is barred because of the failure of petitioners to raise constitutional questions in their pleadings. For all of the reasons set out

---

[13] The government made the same argument before the trial court that it presents here, i.e., that because petitioners represent the Republic of Cuba, the exemption provision in Section 3(d) of the Act does not apply. In addition, we submit that our brief discussion of the merits in our main brief (fn. 18, pp. 25-26) is fully corroborated by the government's more elaborate demonstration (Br. 17-24) that the Act was designed to cover foreign agents in the area of propaganda.

both in our main brief and this reply brief we believe that the complaint is sufficient even in the absence of any allegations of unconstitutionality. However, it would not serve the interests of either party for this case to be decided on a pleading point, thus requiring petitioners to raise these questions either in a new complaint or an amended complaint, if in fact constitutional issues are fairly raised by the facts and the controversy (see our discussion of this question in our main brief pp. 13-14).

Since two separate constitutional questions are mentioned by the government, we will discuss each separately.

A. The Constitutional Question Arising From the Foreign Agents Registration Act.

At the time of the filing of their complaint, it was petitioners' position that the Act expressly exempted them from its scope, and for that reason respondent's demand that they register was unlawful and exceeded the authority granted to him under the Act. Accordingly, petitioners saw no reason or basis to challenge the constitutionality of an Act that did not apply to them.[14] However, in the course of this litigation, we have learned that, according to the Attorney General, the statute is not at all clear and definite but is, on the

---

[14] Petitioners did not and do not care to argue that Congress lacks the constitutional power to require registration by attorneys who represent foreign principals in purely financial and mercantile matters. Our contention was and is that Congress expressly did not require such registration. Of course if such registration were required, the information sought by the attorney General would have to be limited to matters relevant to the representation. Admittedly, see supra p. 8, fn. 9, the respondent's registration forms are not so limited.

contrary, vague and ambiguous and to be enforced as he interprets it. If this is so, then, as a criminal statute it is unconstitutional because it does not furnish an ascertainable standard of guilt, *Connally* v. *General Construction Co.*, 269 U.S. 385; *Lanzetta* v. *New Jersey*, 306 U.S. 451. This defect in the statute has been infused into it by the Attorney General's attempt to apply the statute far beyond the purpose for which it was enacted. The vagueness in the statute as administered by the Attorney General is graphically illustrated by the testimony of Mr. Arthur H. Dean, senior partner of Sullivan & Cromwell before the Senate Committee. According to Mr. Dean, the Department has told some lawyers who represented foreign principals that they are not required to register if they confine themselves to "just giving legal advice" and "were not trying to lobby or promote anything. . . ." (Hearings pp. 49, 51). And according to Mr. Dean, the Department itself admittedly does not know what the law means.[15]

We think petitioners' pleadings fairly read would permit petitioners to argue that if they are not exempted by the plain language of the statute, then the statute is too vague to be enforced in a criminal prosecution at least insofar as it is applied to other than

---

[15] Mr. Dean testified as follows (Hearings, 52):

"In a number of my talks that I have had with the Department of Justice over the years, the thing they have always been concerned about in the previous law was it was so broad and so vague that they did not know how to interpret it . . ."

And Chairman Fulbright commented (Hearings, 56): "I think you have raised a very difficult problem, and one of the problems of enforcement in existing law has been the difficulty of interpreting some of these provisions."

See also Hearings, 75.

foreign propaganda agents. We ask the Court to construe the pleadings in that fashion, or alternatively to consider the complaint as if it had been amended to include such an allegation. It would serve no purpose to defer the matter, since if this Court does sustain the dismissal of the complaint because of the failure to make this allegation, petitioners will in any event move to amend the complaint when the case is returned to the trial court.[16]

B. The Unconstitutional Denial of Judicial Review.

The government and the court below also chide counsel for failing to raise the constitutional issue presented by petitioners' allegation that the penalties in a criminal prosecution are too severe for that to serve as an adequate method of judicial review. According to the government, petitioners should have further alleged that the denial of an adequate judicial remedy was unconstitutional. Petitioners made no such allegation because, in their view, they were afforded an adequate judicial remedy by the Declaratory Judgment Act. In essence the government's argument is that the Court should deny relief because petitioners do not argue that if the Court denies relief, such action would be unconstitutional. We submit that there is no need for the Court to engage in such tortuous reasoning in order to determine whether petitioners state a cause of action in equity and under the Declaratory Judgment Act.

---

[16] Since the trial court found no defect in the complaint, petitioners had neither the occasion nor the opportunity to apply for leave to amend under Rule 15(a) of the Federal Rules of Civil Procedure which provides that "leave shall be freely given when justice so requires." Moreover, a trial court's denial of leave to amend would constitute reversible error, *United States* v. *Hougham*, 364 U.S. 310.

III. The Sovereign Immunity Doctrine Is Not a Bar to the Present Suit

We submit that in the final analysis the issue of sovereign immunity must be resolved on the basis of the same considerations which we have recited as justifying the bringing of a declarstory judgment action. As the government's brief acknowledges (pp. 53-54) the issue must be resolved on the basis of practical and policy considerations. As shown by the authorities cited in our main brief (pp. 20-23), there is no mechanical rule of sovereign immunity. And in the absence of some overriding policy considerations, the principle of *Stark* v. *Wickard*, 321 U.S. 288, 290 that "executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy" applies.

In our main brief (pp. 17-21), we demonstrated that for the most part, the Court has found such overriding policy considerations as require invocation of the sovereign immunity doctrine only in situations involving suits for specific performance, for government funds or for specific property in the possession of the government, and not in situations similar to that presented here. The government, ignoring our authorities, replies (Br. 53) that the doctrine has "frequently" been invoked even though property was not involved.[17] But

[17] Significantly, the government makes only the feeblest of efforts (Br. 50, fn. 21) to distinguish the numerous cases cited in our brief (pp. 18-20) in which this Court has assumed jurisdiction of suits challenging the actions of government officials and in which it "interfered with the public administration" and which cannot possibly be fitted into the formula of the *Larson* case. For a discussion of some of these cases, especially the significance of *Vitarelli* v. *Seaton*, 359 U.S. 535, see 3 Davis, *Administrative Law*, ch. 27, 1963 Pocket Part, pp. 114-116.

to support this assertion of "frequent" holdings, the government cites only one case in this Court, *Louisiana* v. *McAdoo*, 234 U.S. 627. Although the Court used sovereign immunity language in its decision, the holding in the case was that Congress had vested the Secretary of the Treasury with the unreviewable discretion to set tariff rates. The principle in the *McAdoo* case is essentially no different from that involved in the *Panama Canal* case discussed *supra*, p. 9, fn. 12, i.e. that the Court will not intervene where Congress has vested an administrative agency with unreviewable discretion. The fact that the Court reached the same result in the *Panama Canal* case where Congress has expressly provided that the Panama Canal Co. could sue and be sued amply demonstrates that the principle applied in the two cases does not rest upon the sovereign immunity doctrine.[18]

---

[18] The other cases cited by the government to demonstrate the "frequent" application of the sovereign immunity doctrine to non-property cases are all court of appeals decisions, and are equally inapposite to prove the government's point. The discussion of sovereign immunity in *Rogers* v. *Skinner*, 201 F. 2d 521, 524 was entirely unnecessary to the decision in the case since the court held that the complaint should be dismissed because the Secretary of Labor was an indispensable party and that the complaint lacked merit in any event. In both *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, and *Harper* v. *Jones*, 195 F. 2d 705, the courts held that the judiciary had no competence to review the discretion of the commanding officer of a military base in setting certain establishments "off limits" for military personnel. Obviously the sovereign immunity doctrine has no significance when applied in a case where the complaint would be dismissed in any event. It is meaningful only when applied as in *Larson*, where absent the sovereign immunity barrier, the plaintiff would be entitled to recover. So here the government's burden on the sovereign immunity question is to show that petitioners are barred even if their complaint otherwise states a cause of action in equity.

To bring the present case within the principle of the *McAdoo* case, the government would have to show that the interpretation of the Foreign Agents Registration Act rests in the unreviewable discretion of the Attorney General. But the government does not even contend that. It acknowledges, as it must, that the courts can and should review his interpretation. It argues only that such review can be had only in a criminal prosecution. Thus the basic issue in this case is simply the question of the choice of remedy.

The government also argues a lack of precedent. It states (Br. 52):

> "Thus, we have found no case in which the Court has upheld jurisdiction . . . where the action complained of was merely the bringing of a criminal proceeding in which the defendant could fully litigate all his claims and defenses."

But this begs the question. We freely concede that if we have not made out a case that petitioners are entitled to declaratory judgment relief because a criminal proceeding does not furnish an adequate remedy, then our complaint is insufficient for lack of equity. If so, there is no need to invoke the doctrine of sovereign immunity. On the other hand, if we have made out a case in equity there is no authority for the proposition that sovereign immunity bars a suit such as the present in the absence of another adequate judicial remedy.

We submit that the absence of a contrary precedent is under the circumstances far more significant than our alleged failure to cite a case precisely in point. For it demonstrates that the government is asking the Court to extend the sovereign immunity doctrine to a

new and heretofore unexplored area. Since the doctrine is in current disfavor (see our main brief, pp. 21-22), it should not be so extended except for overriding policy considerations. And the government recites none.

Finally, we submit that the cases of *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U.S. 177 (discussed in our main brief at pp. 15-16) are controlling precedents for the exercise of jurisdiction here. The government attempts to distinguish these cases (Br. 46-47) on the ground that in each, the plaintiffs had no adequate remedy in the criminal proceedings provided by the respective statutes.[19] But that is exactly the contention we make here. Of course, the circumstances of the particular statute which creates this problem and renders the criminal proceeding inadequate for judicial review differs here from the circumstances present in *Shields* and *Stimson*. But the circumstances of those two cases also differ from each other. Nonetheless, the principle is the same. Accordingly, if, as we have shown, petitioners have no adequate judicial remedy in a criminal proceeding, *Shields* and *Stimson* establish that under such circumstances, the doctrine of sovereign immunity is not a bar to the present action.

---

[19] We find nothing in the Court's opinion in the *Shields* case to support the government's contention that the determination of the Interstate Commerce Commission was not subject to judicial review in a criminal proceeding. We agree, however, that the issue in *Shields*, as here, was whether equity jurisdiction may be invoked under circumstances where the criminal prosecution does not offer an adequate remedy.

CONCLUSION

As shown by the Hearings before the Senate Committee on S. 2136 the difficulty in the present situation has been created by the efforts of the Department to apply the Foreign Agents Registration Act beyond the original congressional purpose of requiring the registration of foreign propaganda agents (see Govt. Br., pp. 17-24). The government has acknowledged that it itself is doubtful of the interpretation of the statute in other areas such as that represented by the petitioners' situation (see *supra*, p. 12). Petitioners, on the other hand, believe that their activities are exempt and see no reason why they should be required to surrender their important rights of privacy by registering if Congress has not so commanded. Their dilemma is that the criminal sanctions of the Act with its possible consequences on their standing as members of the bar are much too severe for them to submit their views to judicial review in a criminal proceeding. They seek, therefore, to bring this proceeding for the sole reason of having the courts determine the meaning and interpretation of the Foreign Agents Registration Act. Court determination of this legal question will in no way interfere with the administration of the Act, especially in view of the government's acknowledgment that this is a "test" case.

If the Court determines that petitioners' activities fall within the scope of the Act they will register; if the Court determines to the contrary, they will not register. In either event the purpose of the Act will not be thwarted. On the other hand, absent the availability of judicial review in this proceeding, the petitioners will have no choice except to comply with respondent's onerous demand of registration even if they

are exempt from the Act. As we show in our main brief (pp. 28-32), this is precisely the situation which Congress intended to be covered by the Declaratory Judgment Act. The sovereign immunity doctrine should not pose a barrier to effectuating the congressional intent as expressed in that Act.

Respectfully submitted,

DAVID REIN
Attorney for Petitioners